Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

LAWRENCE MARKS; SUN BANK/MIAMI, N.A. and EDWARD A. MOSS, as personal representatives of the estate of Eugene Marks; MORRIS S. MARLIN, as personal representative of the estate of Paul Marks; HERMAN MARKS; IRENE O. MARKS, individually and as personal representative of the estate of Stanley Marks; MARKS DEVELOPMENT, INC.; and ISLAND IN THE SUN CONDOMINIUMS OF KEY WEST FLORIDA, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioners were plaintiffs in a Tucker Act claim seeking compensation from the United States under the Fifth Amendment for a temporary taking of a 52-acre parcel of real property. They suffered an adverse summary judgment on the ground that the taking was not compensable. Because approximately three acres of the parcel were below the mean high water line (MHWL) and the remainder of the parcel was above the MHWL, different legal considerations were applied to the two portions of the property. The questions presented are:

1. In a Takings Clause claim, with respect to property below the MHWL, is the government's "navigational servitude" absolute when asserted, not "in aid of navigation," but solely in aid of environmental protection?

2. In a Takings Clause claim, with respect to property above the MHWL, is a property owner properly denied compensation for "the value of the use of the land" during a period of temporary taking simply because the property has increased in value during the period of taking and is sold for a profit after the taking ceases?

Although those are the principal questions presented, the petitioners' claim for compensation for the temporary taking of the property above the MHWL was rejected for two additional reasons below. To ensure that the case can be disposed of in its entirety here, a third question is presented which need only be reached if review of the first two is accepted:

QUESTIONS PRESENTED – Continued

3. Did the trial court err in concluding (1) that the petitioners had only a tort claim, not a Tucker Act claim, and (2) that the government's temporary taking did not interfere with any reasonable investment-backed expectations in development of the property?

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Federal Claims (App. 1a-53a) is reported at 32 Fed. Cl. 387. The Court of Appeals for the Federal Circuit wrote no opinion; its *per curiam* affirmance (App. 54a-55a) is reported at 116 F.3d 1496.

JURISDICTION

The Court of Appeals entered its judgment on May 15, 1997 (App. 54a-55a). The petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied July 16, 1997 (App. 56a-58a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment, United States Constitution, provides in relevant part: " . . . nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This proceeding arises from an action brought in the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, in which the petitioners, plaintiffs below, sought compensation from the United States under the Fifth Amendment for a temporary taking of real property located in Key West, Florida. The action was disposed of adversely to the plaintiffs on cross-motions for summary judgment (after an inexplicably-long six year delay) when the trial court ruled that, for various reasons, the facts failed to demonstrate that a compensable temporary taking of the plaintiffs' property had occurred. The trial court explained this ruling (and several others not in issue here) at considerable length in a published decision: *Marks v. United States*, 34 Fed. Cl. 387 (1995), *aff'd*, 116 F.3d 1496 (Fed. Cir. 1997) (App. 1a-53a). The United States Court of Appeals for the Federal Circuit affirmed, without opinion (App. 54a-55a).

The facts which follow will be drawn principally from two sources: (1) the facts recited in the trial court's decision; and (2) the facts recited in the 1982 "Memorandum Opinion Containing Findings of Fact and Conclusions of Law" entered by the United States District Court for the Southern District of Florida, which disposed of the bulk of the underlying dispute between the plaintiffs and the government which gave rise to the temporary taking claim in issue here, and from which the trial court derived most of the facts recited in its decision (App. 59a-94a).

Key West, Florida, is an island city, approximately five square miles in size. In 1970, this tiny island had a

population of nearly 30,000. Its land is therefore precious, and because it is a low-lying island, much of its land is wetlands. Prior to 1973, its wetlands were filled and developed without regulation by either the state or federal governments. There was extensive development, both residential and commercial, in the area surrounding the relatively small parcel in issue here – none of which had ever been regulated by any governmental entity except the City. In fact, much of the land surrounding the parcel in issue here, as well as land on several nearby islands, had been filled and developed by the federal government itself.

It was against this background that, in June, 1972, the plaintiffs (and predecessors in interest) purchased a 52-acre tract known as Parcel 38 (and an easement over an adjacent tract to the east, Parcel 34, to provide roadway access to Parcel 38, and the right to purchase the fee in that strip in the future), with the intent of developing it as a multi-unit apartment complex and marina, in accordance with the Master Plan of the City of Key West and its applicable zoning regulations. Because of the nature of the property, it could not be developed or used for any economically viable purpose unless it were first filled (App. 102a-105a).

At the time the property was purchased, it was statutorily exempt from state requirements for dredge and fill permits; the state did not require water quality certification for such a project; the federal government did not assert jurisdiction over any property above the mean high water line (MHWL); and the federal government, historically, had never exercised its jurisdiction below the MHWL in this area. On November 1, 1972, the plaintiffs

obtained from the City of Key West the only dredge and fill permit which was required, and they were assured at the time by an official of the City that no federal permit was required. Filling of the property commenced shortly thereafter, and by the end of December, 1972, at a cost of approximately $50,000.00, a perimeter berm (which covered about three acres, or less than six percent of the property) had been constructed on Parcel 38.

On January 24, 1973, the Army Corps of Engineers asserted its jurisdiction under § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 – the first time any such action had been taken in the area in the 73 years that the Act had been on the books – and ordered the plaintiffs to cease and desist all filling below the MHWL. The plaintiffs complied with the order and ceased all filling activity. This order was followed by a letter dated April 9, 1973, in which the Corps demanded that the plaintiffs remove all fill which had been placed below the MHWL. Although neither the order nor the letter required removal of the fill placed above the MHWL, and therefore did not purport to prevent further development of the property above the MHWL, the Corps was unable to tell the plaintiffs the location of the MHWL; indeed, it had neither the requisite scientific evidence nor any of the data needed to locate that elusive line in December, 1972. To proceed with the project in the face of this uncertainty would therefore risk further violation of the now-asserted law, a potentially expensive gamble which no prudent businessman would take, so the plaintiffs ceased all development of the property pending resolution of the Corps' intervening demand.

The government then initiated a criminal proceeding against one of the corporate plaintiffs in the United States District Court for the Southern District of Florida, which was resolved in August, 1973, by stipulation between the parties, a plea of *nolo contendere*, and a *de minimis* fine of $500.00. The stipulation recited that the Corps historically had not exercised its jurisdiction below the MHWL in the area of the fill; that the filling had taken place in the belief that a fill permit was not required, and in good faith reliance upon a City official's assurance that no federal permit was required; that all filling had ceased immediately upon receipt of the cease and desist order; that the public interest issues implicated by the criminal charge would best be handled by processing an application for an after-the-fact permit; and that the Corps would consider the public interest factors implicated by the application as analogous to those considered in a similar application for a permit to fill property in the same area, which the Corps had granted in March, 1973. At the hearing held on the plea and stipulation, the presiding United States District Court judge, the Honorable William O. Mehrtens, who could not fairly be accused of being "soft" on environmental or ecological matters, stated that the property had no use other than as a breeding ground for mosquitoes; that the property ought to be filled and developed to meet the needs of the growing City; and that the Corps ought to issue a permit to allow its development.

An application for an after-the-fact permit had been submitted in July, 1973, approximately a month before the hearing on the criminal charge. In connection with this application, the parties had agreed upon a compromise

location for the MHWL, numerous changes had been made to the development plans at the Corps' request, and the Corps had assured the plaintiffs that a permit would be issued (App. 102a-105a). Unfortunately, although the State of Florida had not required water quality certification in December, 1972, when the perimeter berm was completed, at the time the application was submitted the state was requiring water quality certification, and the Corps therefore required the plaintiffs to obtain certification from the state before it would issue the permit (*id.*). The plaintiffs applied for water quality certification, which was denied in April, 1974. Because of this denial – and for that reason alone, and without consideration of the merits of the application otherwise – the Corps denied the plaintiffs' application for an after-the-fact permit, and once again ordered removal of all fill below the compromise MHWL.

In an effort to salvage their now thoroughly obstructed project, the plaintiffs appealed the denial of water quality certification to the appropriate state agency. While this appeal was pending in 1975, the Corps approved a nearly identical filling project which had been undertaken by others on the contiguous parcel adjacent on the east, Parcel 34 (which contained the access road to Parcel 38), allowing only partial restoration of this parcel by means of mere breaks in the perimeter berm. The Corps continued to insist that the plaintiffs effect total restoration of the adjacent Parcel 38, however, by removing *all* the fill placed below the MHWL. In the same time frame, the Corps revised its wetlands policy, and by regulations issued in 1975 it began exercising jurisdiction over and requiring permits for development of property

above the MHWL as well – a permit which could not be obtained by the plaintiffs because of the state's 1974 denial of water quality certification. The plaintiffs thereafter exhausted their state administrative and judicial remedies with respect to water quality certification, without success.

In 1977, notwithstanding its inconsistent agreement to only partial restoration of Parcel 34 in 1975, the Corps once again ordered the plaintiffs to remove all fill placed below the compromise MHWL on Parcel 38. Believing that they were being treated unfairly by the government, and unable to afford the $90,000.00 cost of removing all the fill, the plaintiffs did not comply. As a result, in October, 1980, the government brought an enforcement action in the United States District Court for the Southern District of Florida, seeking a permanent injunction requiring the plaintiffs to remove all of the fill material placed below the MHWL on Parcel 38. The State of Florida intervened in the action on the government's side. The plaintiffs answered, and because they had been sued despite their prior agreement on a compromise MHWL and the Corps' prior assurances that a permit would be issued based on the compromise, they denied that any fill had been placed below the MHWL and demanded that the government now meet its burden of proving the location of that line.

Relying upon equitable principles concerning restoration previously established by federal decisional law, the plaintiffs also proposed that only a partial restoration of the property below the MHWL, similar to the partial

restoration which the Corps had approved for the adjacent parcel in 1975, be ordered. The plaintiffs also counterclaimed against the government and the state, seeking injunctive relief from prospective permitting of Parcel 38 above the MHWL. A claim for damages was also asserted against the government, seeking compensation under the Fifth Amendment for the taking effected by the Corps' actions. At the government's request, this claim was dismissed without adjudication on the ground that the plaintiffs' exclusive remedy for the alleged taking was an action in the Court of Federal Claims under the Tucker Act. During the course of this litigation, the plaintiffs applied once again for an after-the-fact permit, but the Corps refused to consider the application on its merits on the ground that the litigation was pending.

Following a bench trial, the Honorable Sidney M. Aronovitz entered the "Memorandum Opinion Containing Findings of Fact and Conclusions of Law" from which we have borrowed most of the facts here (App. 59a-94a). In a nutshell, the Court found that the issuance of the cease and desist order in 1973, at a time when the Corps was unable to determine the location of the MHWL, was the principal cause of the plaintiffs' inability to develop the property thereafter, either below or above the MHWL; that the government had failed to prove the location of the MHWL at trial; and that the location of the MHWL would be fixed by the Court at the compromise MHWL previously agreed upon by the parties in connection with the abortive permitting process to which the Corps had subjected the plaintiffs. The Court also concluded that the government's demand for full restoration of Parcel 38 by removal of all the fill below the MHWL at a cost of

$90,000.00 was inequitable, and it ordered only partial restoration of the property by allowing the plaintiffs to include breaks in the perimeter berm below the MHWL, as the Corps had allowed on the adjacent parcel, at a cost of only $5,000.00 to $6,000.00.

The Court also observed that, had the Corps not intervened in 1973 without knowing the location of the MHWL, the property would have been filled above the MHWL before the state began requiring water quality certification and before the Corps revised its wetlands policy in 1975, and it would therefore have been "grandfathered and exempt" from these permitting requirements. And because of this conclusion (and observing that it would be "patently unfair" to do otherwise), the Court enjoined both the government and the state from requiring prospective permitting of the property above the MHWL. As a result of these rulings, the plaintiffs were restored to the conditions existing in December, 1972, and they were permitted (conditioned upon partial restoration below the MHWL) to fill and develop the property above the MHWL without permits – i. e., to finish what they had begun in 1972, but had been prevented from doing by the Corps for a period of nearly 10 years. Still intent upon stopping development of the property altogether, the government appealed the decision to the United States Court of Appeals for the Eleventh Circuit, which rejected the government's challenges and affirmed the decision in March, 1984. *United States v. Context-Marks Corp.*, 729 F.2d 1294 (11th Cir. 1984) (App. 95a-101a).

In 1986, when the plaintiffs began filling and widening the access road across Parcel 34 in order to enable

development of Parcel 38, the Corps intervened once again by threatening the bulldozer operators with jail and fines if they did not cease and desist. The plaintiffs filed a motion to enforce the mandate in the prior litigation, which was heard by Judge Aronovitz. The government acknowledged that a 30-foot strip of Parcel 34 had been involved in the prior litigation and was therefore exempt from permitting requirements, but insisted that the plaintiffs were not entitled to widen the road beyond 30 feet without obtaining a permit.

Judge Aronovitz denied the motion to enforce on the ground that the full width of the road was not encompassed within his prior decision, but the motion was denied without prejudice to the plaintiffs to bring a separate action for relief from the Corps' latest obstructive tactic. In a concluding footnote, Judge Aronovitz observed:

> This litigation and its predecessor administrative proceedings commenced over sixteen [sic] (16) years ago and has proceeded through state courts to the Florida Supreme Court, as well as in the United States District Court up to the level of the Eleventh Circuit. Although this Court deems itself without subject matter jurisdiction with regard to the Motion, it cannot help but observe that the subject matter is not new and a reasonable determination could be made by the United States without the requirement of a further permit application and without any precedent being set by such an expedited administrative determination. The position of the government in refusing to consider the widening of the road to conform to the sixty (60') foot strip is indeed arbitrary and capricious.

When the Corps failed to heed the rather pointed message in this footnote, a subsequent federal action was filed by the plaintiffs, but its details are not material to the issues presented here. Suffice it to say that, probably as a result of the footnote quoted above and perhaps because of developments in the subsequent action, the Corps finally "decided to back off," and the development of the property begun in 1972 was finally allowed to proceed. An economically viable use of Parcel 38 was thereby restored. Frustrated by the 16-year delay in their plans, however, the plaintiffs decided not to proceed, and they sold a majority of Parcel 38 to other developers in 1989 (and donated a portion of the property to the City). They then filed the instant action, seeking compensation for the damages caused them by the temporary taking effected by the Corps' actions between 1973 and the date that economically viable use of the property was restored.

The trial court gave four principal reasons for granting the government's motion for summary judgment. With respect to the portion of Parcel 38 below the MHWL, it held that the government's "navigational servitude" was absolute and supreme, and that a taking of this portion of the property was therefore noncompensable as a matter of law (App. 31a-33a). With respect to the portion of Parcel 38 (and the access strip on Parcel 34) above the MHWL (which were not subject to the government's "navigational servitude"), it held that the plaintiffs failed to demonstrate that they were deprived of all economically viable use of the property by the Corps' actions, for the principal reason that the property was ultimately rendered developable by Judge Aronovitz's decision, and "as of September 18, 1989, plaintiffs sold the majority of

Parcel 38 for millions of dollars. The consideration received from this sale alone demonstrates the remaining economic viability of the property" (App. 51a). It also concluded (1) that the Corps' actions were not within its authority, and that the plaintiffs therefore had only a tort claim, not a Tucker Act claim; and (2) that the Corps' actions did not interfere with any reasonable investment-backed expectations. The latter two conclusions were plainly indefensible on the facts, so the government devoted the bulk of its defense in the Court of Appeals to the first two rulings. The Court of Appeals affirmed the summary judgment, without opinion.

REASONS FOR GRANTING THE PETITION

1. The lower courts' conclusion that the government's "navigational servitude" is absolute conflicts with a decision of this Court.

The trial court concluded that the government's "navigational servitude" is absolute, and that the Corps could therefore "take" the portion of Parcel 38 below the MHWL with impunity, and without any obligation to pay just compensation for the taking. Numerous decisions were cited in support of this conclusion, and we cannot deny that they contain language which appears to make the government's "navigational servitude" rather absolute. However, there is a distinction between those cases and this one which the trial court failed to detect. In the cases relied upon by the trial court, the government's "navigational servitude" was asserted "in aid of navigation." In the instant case, the government's "navigational servitude" was not asserted "in aid of navigation"; it was

asserted solely in aid of environmental protection. We respectfully submit that, in this entirely different context, the government's "navigational servitude" is not absolute, and that just compensation is due for a taking of property below the MHWL for purely environmental reasons.

Despite the absolute language in many of its prior decisions, this Court made it clear in *Kaiser Aetna v. United States*, 444 U.S. 164, 172, 177-78 (1979), that it "has never held that the navigational servitude creates a blanket exception to the Takings Clause"; that the "navigational servitude . . . exists by virtue of the Commerce Clause in navigable streams [and] gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce"; that an assertion of the servitude "in aid of navigation" is therefore typically noncompensable; but that an assertion of the servitude for other reasons, like creating a public right of access to a navigable pond for recreational purposes, "goes so far beyond ordinary regulation or improvement for navigation as to amount to a [compensable] taking. . . . " In our judgment, if the exercise of the navigational servitude in the name of "public access for recreation" can result in a compensable taking, as it did in *Kaiser Aetna*, then exercise of the servitude to preserve the public's interest in the environment ought to result in a compensable taking as well. We respectfully submit that the conflict is undeniable, and we urge the Court to resolve the conflict.

Because all Takings Clause claims against the United States must be brought in the Court of Federal Claims

and reviewed only in the Court of Appeals for the Federal Circuit, we cannot direct the Court to any inter-circuit conflicts on the point. But the fact that no inter-circuit conflict can ever develop on this point convinces us that an intra-circuit conflict can at least call for an exercise of this Court's supervisory power. We therefore note that the Court of Claims concluded shortly after *Kaiser Aetna* that the government's servitude was not absolute, and that the denial of all access to an island "with the purpose and effect of preventing all economic use and holding it as a scenic preserve without paying for it" might be a compensable taking. *Laney v. United States*, 661 F.2d 145, 149, 228 Ct. Cl. 519 (1981). And, more recently, the Court of Appeals for the Federal Circuit has twice recognized that, after *Kaiser Aetna*, the servitude is no longer absolute, and that compensation might be recoverable in regulatory taking cases notwithstanding the servitude. *See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 900 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Owen v. United States*, 851 F.2d 1404, 1416 (Fed. Cir. 1988) (en banc). The disposition of the plaintiffs' claim below was inconsistent with these decisions, and we urge the Court to accept review to ensure that the important constitutional right of which the plaintiffs were deprived is consistently applied by the only courts given any jurisdiction to protect that right.

2. The lower courts' conclusion that the temporary taking was not compensable because the plaintiffs' property increased in value during the period of taking and was sold for a profit after the taking ceased conflicts with decisions of this Court and with a decision of the Eleventh Circuit.

The trial court also concluded that the plaintiffs failed to demonstrate that they were deprived of all economically viable use of the property above the MHWL by the Corps' actions for the principal reason that the property increased in value during the period of taking (as most real property will), that it was ultimately rendered developable by Judge Aronovitz's decision, and that it was sold for a profit after the taking ceased. This was a rather astonishing conclusion, we think, since the plaintiffs had filed affidavits proving that, unless the property were allowed to be filled, it could not be developed or used for any economically viable purpose at all during the period of the taking (App. 102a-105a). And the fact that the plaintiffs plainly *were* deprived of all economically viable use of the property during the more than a decade before the federal courts finally ordered the government to permit its development is, we respectfully submit, not even an arguably debatable proposition.

The government recognized as much. It therefore approached the problem from a somewhat different direction. Instead of gainsaying the undeniable fact that the Corps' actions had deprived the property of all economically viable use for at least a decade, it focused on the measure of damages to be applied to the temporary taking claim, and made what amounted to a "no harm, no

foul" argument. Suggesting that the measure of the plaintiffs' damages was the difference between the market values of the property at the commencement and at the conclusion of the taking, it pointed out that the property had been purchased rather cheaply in 1972, that it had increased in value during the period of the taking, and that it had been sold for a substantial profit in the late 1980's – and it argued that the Corps' actions during the more than a decade in which the property could not be developed caused the plaintiffs no damages. Therefore, the argument went, the plaintiffs had suffered no *compensable* temporary taking for which the Fifth Amendment required the payment of compensation. The trial court failed to recognize that a *temporary* taking involves considerations far different than a permanent taking, and it accepted the argument and explicitly bottomed its grant of summary judgment on it. At oral argument of the cause below, the government effectively placed all of its eggs in this basket.

Most respectfully, the government's contention that no compensable temporary taking occurs when the property increases in value during the period of a temporary taking was dead wrong. The trial court cited no authority for its holding to that effect, and the government has never cited a single authority supporting it. The reason no such authority has been cited is that none exists. In fact, the contention was *squarely rejected* by this Court in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). In that case, the government effected a temporary physical taking of a laundry plant during World War II. Following return of the plant to its owners after the war, litigation ensued over the amount of compensation which was due

for the temporary taking. Because the value of the business had decreased considerably during the taking, the owners contended that their compensation should be measured by the difference between the market values of the business on the date of the taking and on the date of return. The trial court disagreed and awarded the owners the "rental value" of the business during the period of taking. The Eight Circuit affirmed.

On certiorari, this Court rejected the owners' position once again, explaining in pertinent part as follows:

> . . . We agree with both lower courts, therefore, that the proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in the two recent cases dealing with temporary takings. [Citations omitted]. *Indeed, if the difference between the market value of the fee on the date of taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy.*

338 U.S. at 6-7 (emphasis supplied).

Of course, the position upon which the government staked its case for summary judgment below – that no compensable taking occurred because the market value of the plaintiffs' property after its return was greater than its market value on the date of the taking – was simply the *negative* of the emphasized portion of this quotation. It was therefore precisely the position which this Court *rejected* in *Kimball Laundry* as being the proper measure of damages in a temporary taking case. And when this

Court more recently extended its prior jurisprudence in the area of physical takings to apply to regulatory takings (like the one in issue here) as well, it relied explicitly upon *Kimball Laundry*, and it was careful to define the measure of damages, as it had in *Kimball Laundry*, to "the value of the use of the land":

> These cases [including *Kimball Laundry*] reflect the fact that "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. . . . The United States has been required to pay compensation for leasehold interests of shorter duration than this. The value of the leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. . . .
>
> Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for *the value of the use of the land during this period*. . . . Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.
>
> . . . .
>
> Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of *fair value for the use of*

> *the property during this period of time* would be a constitutionally insufficient remedy. . . .

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 318-19, 321-22 (1987) (emphasis supplied).

The teachings of *Kimball Laundry* and *First Lutheran Church* have been followed by the Federal Circuit in circumstances legally indistinguishable from the instant case. *See Yuba Natural Resources, Inc. v. United States*, 821 F.2d 638 (Fed. Cir. 1987). And in a subsequent decision in the same case, the Federal Circuit relied once again upon *Kimball Laundry* and *First Lutheran Church*; rejected once again a contention that the measure of damages for a temporary taking should be determined by the difference in market values on the date of the taking and the date of the return; and reiterated once again the point which neither the trial court nor the government has acknowledged or understood in this case:

> Normally, the proper measure of just compensation for the government's permanent taking of private property is "the fair market value of [the] property at the time of the taking." . . . In the case of a temporary taking, however, since the property is returned to the owner when the taking ends, the just compensation to which the owner is entitled is *the value of the use of the property during the temporary taking*, i. e., the amount which the owner lost as a result of the taking.

Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990) (emphasis supplied).

The Eleventh Circuit has also applied the teachings of *Kimball Laundry* and *First Lutheran Church* to the type of problem presented in this case. In *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987), much like in the instant case, a trial court was confronted with a temporary regulatory taking which halted the development of a 120-unit apartment complex. It held, as the trial court held in the instant case, that no *compensable* temporary taking had occurred because the property had increased in value from $160,000.00 to $210,000.00 during the period of temporary taking. The defendant-municipality defended this ruling on appeal with precisely the same argument which the government made in the instant case.

Relying upon *Kimball Laundry* and *First Lutheran Church*, the Eleventh Circuit rejected the argument and reversed the ruling:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. . . . The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction. . . .
>
> . . . .
>
> . . . [T]he district court plainly applied an incorrect measure of damages. The court concluded

> that the [plaintiff] had suffered no compensable loss because the property's value after the lifting of the regulatory restriction was greater than its value before the restriction came into effect. The district court's analysis fails to account for their loss as measured by the formula we set forth above, that is, the loss in income-producing potential suffered over the sixteen months that Ordinance No. 216 was in effect. On remand, the district court must determine the amount of that loss.

833 F.2d at 271. For a similar, consistent decision, *see Nemmers v. City of Dubuque*, 764 F.2d 502, 504-85 (8th Cir. 1985).

Most respectfully, the fact that the plaintiffs' property increased in value during the more than a decade in which it was undeniably rendered useless by the Corps' regulatory actions, and the fact that the property was sold for a profit after its use as developable property was restored by the federal courts, were *not* legitimate reasons for declaring that the plaintiffs suffered no compensable temporary taking of their property. The Fifth Amendment plainly mandates instead that the plaintiffs be compensated for "the value of the use of the land" during the more than a decade that they were deprived of its use. The lower courts failed to recognize the difference between a permanent taking and a temporary taking in this case, and the plaintiffs were plainly deprived of their constitutional right to just compensation in the process. We respectfully urge the Court to accept review to resolve the conflicts.

3. The remaining reasons given by the trial court for rejecting the plaintiffs' claim for compensation with respect to the property above the MHWL are plainly indefensible.

Because the government is likely to argue that review should be denied because the lower courts' decisions rest on alternative grounds, we should briefly address the principal additional reasons given by the trial court for denying the plaintiffs' claim for compensation with respect to the property above the MHWL. In our judgment, they are plainly indefensible.

For example, the trial court concluded that the Corps' actions were not within its authority, and that the plaintiffs therefore had only a tort claim, not a Tucker Act claim. Most respectfully, the Corps plainly had jurisdiction over the property below the MHWL in 1973 and its actions at the outset were plainly "authorized" – and it hardly lies in the government's mouth to contend otherwise here, since it obtained both a criminal conviction and an injunction ordering partial restoration of the property as a result of its assertion of jurisdiction over the property below the MHWL. To be sure, because neither the Corps nor the plaintiffs had any idea of the location of the MHWL, the plaintiffs ceased all development of the property, both below and above the unknown MHWL, until this line could be determined and the Corps' demands sorted out through the judicial process. And as Judge Aronovitz explicitly found, this was perfectly appropriate conduct under the circumstances, since no reasonably prudent businessman would have gambled

additional time, labor, and money on further development of the property in the face of this critical uncertainty, much less risk an additional violation of the criminal law.

The fact that development of the property above the MHWL became infeasible was therefore simply a consequence of the Corps' fully-authorized assertion of jurisdiction over the property below the unknown MHWL in 1973; it was not the result of any "unauthorized" assertion of jurisdiction by the Corps over the property above the MHWL – and the trial court was plainly confused in concluding otherwise. The temporary taking of the plaintiffs' property, both below and above the MHWL, was caused solely by the Corps' authorized assertion of jurisdiction in 1973, and that is the only conduct upon which the trial court's Tucker Act jurisdiction depended. We should also note that the government did not even bother to defend this indefensible ruling in the Court of Appeals, either in its brief or at oral argument, so it should be hard pressed to defend it here.

The trial court also concluded that the Corps' actions did not interfere with any reasonable investment-backed expectations in development of the property above the MHWL. This conclusion is plainly indefensible because the plaintiffs purchased the property in order to fill and develop it in accordance with the Master Plan of the City of Key West; the Corps' actions prevented the property from being filled and developed for more than a decade; and the federal courts ultimately ordered the government to permit the filling and development of the property above the MHWL, exactly as initially planned. Most respectfully, now that the federal courts have determined

that the property above the MHWL can be filled and developed exactly as planned when it was purchased, it is simply impossible that another federal court can legitimately declare that the plaintiffs had no reasonable expectations that the property could be filled and developed when it was purchased.

The plaintiffs were plainly deprived of their constitutional right to just compensation below, and we respectfully urge the Court to grant review to the end that this important right be restored to the plaintiffs, and to similarly situated future claimants, by its proper enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Lawrence MARKS, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

No. 506-89L.

United States Court of Federal Claims.

Nov. 6, 1995.

Robert L. Parks, Anderson, Moss, Parks & Russo, P.A., Miami, Florida, attorney of record, for plaintiffs.

Dorothy R. Burakreis, General Litigation Section, Land and Natural Resources Division, Department of Justice, Washington, D.C., with whom were the Assistant Attorney General, attorneys of record, for defendant; William Baxter, Assistant District Counsel, Jacksonville District, of counsel.

OPINION

HORN, Judge.

The above-captioned case is presently before this court on defendant's motion to dismiss for lack of jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC) and 28 U.S.C. § 1500 (1988 & Supp.1993), as well as on defendant's motion for summary judgment and plaintiffs' cross-motion for partial summary judgment, both pursuant to RCFC 56.[1] Plaintiffs in this action seek compensation from the United States Army Corps of Engineers

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[1] Following enactment of the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub.L. No. 102-572, the United States Claims Court was renamed the

("the Corps") for an alleged temporary taking of wetlands located in Key West, Florida. In their complaint, plaintiffs allege that "the Army Corps' improper exercise of jurisdiction over the subject parcels constitutes a temporary taking since the imposition of the cease and desist order in January, 1973 and has continued to date." Defendant denies liability, initially claiming a lack of jurisdiction. In the alternative, defendant argues that plaintiffs' taking claim is unsupported in both fact and law.

FACTUAL BACKGROUND

The property in dispute consists of two adjacent parcels of land in Key West, Florida, near the Key West airport, known as Parcel 34 and Parcel 38.[2] The property is bounded on the north by the Riviera Canal, a man-made waterway subject to tidal fluctuation and connected

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United States Court of Federal Claims. In accordance with General Order 33 issued by the United States Court of Federal Claims, the court adopted the rules of the United States Claims Court. The substance of the rules of the court is unaffected by the legislation, other than with respect to the name change of the court and, therefore, the name change of the rules. However, General Order 33 also indicates that if there is a conflict between the new statute and the rules, the statute will control.

[2] In making its findings of fact, this court relies, in part, on the memorandum opinion containing findings of fact and conclusions of law of the United States District Court for the Southern District of Florida, Case No. 79-2323-Civ-SMA, dated January 15, 1982, and upon the agreed to facts derived by comparing defendant's "Proposed Findings of Uncontroverted Fact" filed with this court on November 7, 1990 and plaintiff's "Unilateral Memorandum of Fact and Law" sent by plaintiff to the court and to the defendant on May 19, 1992.

to the Atlantic Ocean and Cow Key Channel. Riviera Canal is a navigable body of water which is connected to the Atlantic Ocean. Parcel 38 consists of approximately 52 acres, the northern portion of which is a low lying, salt marsh area subject to tidal fluctuations. Parcel 34 consists of a 60 foot strip of property, which connects Roosevelt Boulevard on the east to Parcel 38 on the west, and is the only ingress and egress to Parcel 38. On June 13, 1972, plaintiff, Lawrence Marks, on behalf of himself and his uncles, Herman, Paul, Eugene and Stanley Marks purchased an undivided one-half interest in Parcel 38 from Osnardo Drago and Joaquin Pijuan, and also purchased whatever interest the sellers had in Parcel 34. Fee simple title to the access strip, known as Parcel 34, was not acquired until April 29, 1980.

In November 1972, the City of Key West enacted rezoning Ordinance No. 72-37, which permitted construction of four-story apartment complexes and amended the maximum density to allow 22 units per acre. Plaintiffs in this case intended to build and develop the property at issue in accordance with that ordinance. On November 21, 1973, Lawrence, Herman, Paul, Eugene and Stanley Marks, and Osnardo Drago entered into an agreement with Context Industries regarding the sale and development of Parcel 38, and entered into a supplemental agreement on December 12, 1973. Shortly thereafter, on December 28, 1973, the parties signed a final agreement, which transferred Parcel 38 to a new company, Context-Marks Corporation, which was organized for the specific purpose of developing the property.[3] On May 12, 1980, as

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[3] Later, by deed, dated April 29, 1980, Context-Marks acquired Parcel 34 for $6,000.00.

a result of the settlement of a mortgage foreclosure action on the property, *Carlos, et al. v. Context-Marks, et al.*, No. 75-1025-CA-09, Fla. 16th Cir.Ct., Context-Marks Corporation became Marks Development, Inc. Subsequently, on December 27, 1984, Marks Development, Inc. conveyed a 10% undivided interest in Parcel 38, and in whatever interest existed in Parcel 34, to Herman, Paul, Eugene and Stanley Marks, and a 60% interest to Lawrence Marks.

Plaintiff, Island in the Sun Condominiums of Key West, Florida, Inc. ("Island in the Sun"), filed its articles of incorporation on December 29, 1972. Island in the Sun was formed for the purpose of developing and constructing condominiums on Parcel 38, however, Island in the Sun, originally, did not hold ownership interest in the property. Later, on June 26, 1986, the Marks plaintiffs conveyed all of their interest in Parcel 34 to plaintiff Island in the Sun, which then conveyed that interest to the City of Key West.

On or about November 1, 1972, in anticipation of developing Parcel 38 as a multi-unit apartment complex and marina, and in accordance with the Master Plan of the City of Key West and its applicable zoning regulations, plaintiffs applied for and received a dredge and fill permit from the City of Key West. Plaintiffs began their fill operation on Parcel 38 in November and December of 1972. A perimeter berm was completed during December, 1972. Dredging and filling activity, therefore, commenced without a permit from the Corps having been issued. At the time the fill operation on the property was commenced, the Randall Act, Florida Statute 253.135(2), which exempted property within Key West from state requirements for dredge and fill permits, was in full force

and effect. Also, at the time the fill operation was commenced in November and December of 1972, neither the State of Florida nor the Corps generally asserted jurisdiction over any property above the mean high water line,[4] and neither the federal government nor the State of Florida had been requiring permits to fill below the mean high water line in this area.

On January 24, 1973, the Army Corps of Engineers issued a cease and desist order by telegram concerning the placement of fill on Parcel 38. The telegram addressed to Thompson P. Carlos, counsel to the plaintiffs, stated:

> 1. IT IS OUR UNDERSTANDING THAT YOU REPRESENT MESSRS LAWRENCE M MARKS, OSNARDO DRAGO AND JOAQUINA [sic] C PIJUAN WHO ARE ENGAGED IN PLACING FILL IN THE NAVIGABLE WATERS OF THE UNITED STATES ADJACENT TO THE RIVIERA CANAL AND JUST NORTH OF KEY WEST INTERNATIONAL AIRPORT, KEY WEST, MONROE COUNTY, FLORIDA.

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[4] Mean high water was defined in the opinion (Case No. 79-2323-Civ-SMA), issued by the United States District Court for the Southern District of Florida on January 15, 1982, as follows: Mean high water is a term used to designate the arithmetic average of the height above mean sea level of all high tides over a period of 18.6 years. Mean high water at a given geographic location is determined by the establishment of interim tide stations and measuring short term simultaneous differences between readings at those stations and the reading at the operating stations which were established more than 19 years prior to the current measurements. By applying known constants for the 19 year station to the shorter term stations, the equivalent of a 19 year value is interpolated.

> 2. SECTION 10 OF THE RIVER AND HARBOR ACT OF 3 MARCH 1899 (33 USC 403) PROHIBITS SUCH WORK UNLESS IT IS PROPERLY AUTHORIZED BY A DEPARTMENT OF THE ARMY PERMIT.
>
> 3. THERE IS NO RECORD OF A DEPARTMENT OF THE ARMY PERMIT BEING ISSUED FOR THIS WORK.
>
> 44. [SIC] ACCORDINGLY, YOU ARE HEREBY ADVISED THAT YOUR CLIENTS SHOULD CEASE AND DESIST ALL UNAUTHORIZED WORK BELOW THE MEAN HIGH WATER LINE IMMEDIATELY. FURTHER OPERATIONS MAY SUBJECT THEM TO MULTIPLE COUNT PROSECUTION.

This telegram was followed by a letter, dated April 9, 1973, from the Corps ordering removal of the fill. The letter stated, in pertinent part:

> Since a Department of the Army permit has not been issued for the placement of this fill, you are directed to notify your clients, Messrs. Lawrence M. Marks, Osnardo Drago and Joaquin C. Pijuan, to remove all fill placed below the mean high water line in the navigable waters of the United States. You are further directed to complete the removal of this fill by 22 May 1973.
>
> This fill material should be removed in such a manner as to insure that the original elevation is obtained. Let us caution you that removal of additional material, that material not placed as fill, would be considered by this office to be an additional violation of 33 U.S.C. 403. Also, the fill material that is removed should not be placed below the mean high water line in an area that is not properly authorized by a Department of the Army permit.

Although the cease and desist order specifically referenced work below the mean high water line, it did not preclude filling above the mean high water line.

Upon receipt of the cease and desist order, plaintiffs stopped all fill activity. Thereafter, plaintiffs and the United States government entered into a stipulation in a criminal information proceeding in the United States District Court for the Southern District of Florida, Case No. 73-509-Cr-WM, charging unauthorized filling of Parcel 38, and that Island in the Sun was the party responsible for the alleged infractions. On August 16, 1973, Island in the Sun plead nolo contendere to the criminal information and the corporation received a $500.00 fine. At the time of the cease and desist order, the parties had not yet agreed upon a compromise. However, the parties ultimately agreed upon a compromise mean high water line.

Thereafter, Charles Netter, acting on behalf of the plaintiffs, submitted an after-the-fact application for a permit to dredge and fill below the mean high water line, dated June 14, 1973, and revised July 31, 1973. The proposed work included maintaining existing fill which had been illegally placed without a permit below the mean high water line, as well as completing the proposed marina project. Island in the Sun also applied to the State of Florida for water quality certification. The State of Florida denied that application on April 2, 1974, stating that "the project as proposed will have definite long-term adverse effects on the water quality of the Class III waters of the immediate waterway area, Cow Key Channel and will be contrary to policy of the Board of the Department of Pollution Control." Because state certification was a prerequisite to the issuance of a permit under either 33

U.S.C. § 403 (1972) or 33 U.S.C. § 1341 (1972), the Corps denied the corporation's permit application to dredge the marina on July 11, 1974. At that time, plaintiffs were ordered by the Corps to "remove all fill placed in the area agreed upon as below mean high water" by September, 1974.

Plaintiffs appealed the permit denial within the state agency, and in January 1976, the Secretary of the Florida Department of Environmental Protection Regulation issued a final order denying water quality certification and the state permits. The state action was upheld on administrative appeal. Plaintiffs then appealed the denial to the Florida state courts. On October 10, 1977, the Florida Supreme Court denied a petition for certiorari and upheld the state court's May 3, 1977 decision denying certification. *Island-in-the-Sun Condominium of Key West, Inc. v. Governor & Cabinet*, 345 So.2d 831 (Fla.Dist.Ct.App.), *cert. denied*, 352 So.2d 172 (Fla.1977).

On October 26, 1977, and again on November 14, 1977, after plaintiffs had exhausted all administrative and judicial remedies, the Corps reiterated its order to remove the fill from below the compromise mean high water line on Parcel 38. When plaintiffs failed to comply, the Corps brought an enforcement action on October 21, 1980, seeking a permanent injunction and requiring Marks Development, Inc. to remove approximately 20,000 cubic yards of fill material from navigable waters of the United States allegedly placed below the mean high water line on the Parcel 38 property. The Florida State Department of Environmental Regulation intervened in the district court action for the sole purpose of supporting the claims of the federal government, not to assert any independent

claims. In August 1980, the defendants in the district court case (plaintiffs in the instant case), Case No. 79-2323-Civ-SMA, asserted numerous affirmative defenses and counterclaims, including a request for compensation due to an alleged taking.

Following a trial, in a memorandum opinion, the district court dismissed the taking claims against the United States, as well as against the State of Florida. The district court issued a memorandum opinion which stated that because of the inability of the Corps to dispositively determine the location of the mean high water line in January, 1973, the developers were "unable to proceed with the project for fear that additional impermissible filling would take place." The district court, ultimately, adopted the demarcation of the mean high water line which had been previously agreed upon by the parties. The district court found:

> The original cease and desist order did not preclude filling of property above the mean high water line since the Corps did not exercise jurisdiction over land above the mean high water line. Had not the Corps intervened in the subject property by issuing its cease and desist order at a time when there was no precise determination of the mean high water line, then the property filled above the mean high water line would have been grandfathered in and exempt from the Corps' subsequent 1975 wetlands policy.

The United States District Court specifically declined to adopt the argument presented by the Corps that defendants (plaintiffs in the instant case) should be subject to the retroactive application of the Corp's revised wetlands policy, which would require a § 403 permit for property

above the mean high water line in addition to property below the mean high water line. Accordingly, the district court enjoined the United States and the State of Florida from imposing any permit requirements on Parcel 38 property above the mean high water line, as delineated in the previously agreed upon compromise between the parties. The court further concluded that the defendants (plaintiffs in the instant case) should be free to fill and develop the property, subject to compliance with the applicable City of Key West, Florida requirements. The court, however, conditioned the filling and development activity on the partial restoration by defendants (plaintiffs in the instant case) of the area below the compromise mean high water line, thus granting, in part, the government's request for restoration. Specifically, the court ordered the defendants (plaintiffs in the instant case) to restore tidal fluctuations to impounded areas and to promote the free flow of aquatic organisms, by means of breaks in the berms already constructed below the mean high water line. The decision of the district court regarding Parcel 38 was affirmed by the United States Court of Appeals for the Eleventh Circuit. *United States v. Marks Dev, Inc.*, No. 79-2323-Civ-SMA (S.D.Fla. Jan. 15, 1982), *aff'd sub nom. United States v. Context-Marks Corp.*, 729 F.2d 1294 (11th Cir.1984).

Plaintiffs acquired full title to Parcel 34, the property immediately adjacent to Parcel 38, on April 29, 1980, and filling activity on Parcel 34 began in 1986. The filling on Parcel 34 was incidental to the widening and paving of an existing road, the sole access to Parcel 38. Again, the Corps threatened plaintiffs with a cease and desist order, this time with respect to the filling of the sixty (60) foot

wide strip of road situated on Parcel 34, which connected Roosevelt Boulevard on the east to Parcel 38 on the west. Plaintiffs challenged the Corps' action in the United States District Court for the Southern District of Florida by filing a motion to enforce the mandate in the prior Parcel 38 litigation.[5] The district court denied the plaintiffs' motion to enforce the mandate, without prejudice to the filing of a separate and independent action in any court of competent jurisdiction, including the United States District Court for the Southern District of Florida, or to seeking administrative relief. In support of its denial, the United States District Court concluded that because the full width of the roadway in Parcel 34 was not encompassed within the scope of the complaint, counterclaim, memorandum opinion, final judgment and/or Eleventh Circuit opinion, which all dealt only with Parcel 38, the district court lacked subject matter jurisdiction to enforce the mandate regarding activity on Parcel 34.

On November 4, 1988, plaintiffs sought relief in the United States District Court for the Southern District of Florida (Case No. 88-10081-CIV-King). The plaintiffs asked for declaratory and injunctive relief to determine the legality and constitutionality of the government actions. Plaintiffs also claimed damages in excess of

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[5] The record reflects that on June 26, 1986, after the filing of the motion to enforce the mandate, but prior to the court's disposition of the case, Lawrence, Herman, Paul, Eugene and Stanley Marks conveyed all of their interests in Parcel 34 to Island in the Sun. Island in the Sun subsequently conveyed Parcel 34 to the City of Key West.

$10,000.00 for the loss and use of their property, commencing with the imposition of the cease and desist order in January, 1973, based upon an alleged temporary taking of Parcels 34 and 38 by the Corps. The plaintiffs alleged that the improper requirement to seek a permit on Parcel 34 amounted to a violation of the Fifth Amendment to the Constitution, and prevented plaintiffs all economically feasible and reasonable beneficial use of their property, both Parcels 38 and 34.

Although the original complaint in the district court was comprised of five counts, only count I of the complaint remained pending before the district court as of the date of filing the above-captioned case in the United States Court of Federal Claims on September 18, 1989.[6] Plaintiffs had voluntarily dismissed count II in the district court on April 8, 1989. Subsequently, counts III, IV and V also had been dismissed by the district court on August 11, 1989. The remaining count, count I of plaintiffs' November 4, 1988 district court complaint, was titled COUNT I, COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. Count I, paragraph 32, of the 1988 district court complaint specifically seeks declaratory, injunctive and other relief to determine the legality and constitutionality of actions respecting "all of plaintiff's property within the city limits of Key West. . . . " Furthermore, paragraph 31 realleges those allegations contained in paragraphs one through twenty-six of the

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[6] Thereafter, the sole remaining claim in the district court case, count I, was dismissed by stipulation on April 12, 1990, although that action was taken following the filing of the action in the United States Court of Federal Claims.

complaint, paragraphs that on at least twelve separate instances reference both Parcels 34 and 38. Consequently, the allegations in the relevant district court action cover both Parcels 34 and 38.

In the United States Court of Federal Claims, plaintiffs stated their request as a "Temporary Taking Against the Army Corps," also regarding both Parcels 34 and 38. Plaintiffs have not asked for injunctive or declaratory relief in this court. In response, defendant has filed a motion for summary judgment on Parcels 34 and 38, and plaintiffs have filed an opposition to defendant's motion for summary judgment, together with a cross-motion for partial summary judgment.[7] At the oral argument in this court, the defendant raised for the first time the issue of this court's jurisdiction, based on the impact of 28 U.S.C. § 1500, following the decision in the United States Court of Appeals for the Federal Circuit's en banc opinion in *UNR Industries v. United States*, 962 F.2d 1013 (Fed.Cir.1992), and the subsequent appeal of the case to the United States Supreme Court under the name *Keene Corp. v. United States*.[8] This court ordered further

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[7] Although plaintiffs have titled their pleading a "Motion for Partial Summary Judgment," they appear to raise taking issues, which, if decided in their favor, could dispose of the whole case.

[8] UNR Industries involved a claim brought by Asbestos manufacturers against the United States to recover indemnification for liability to shipyard workers. The United States Claims Court granted the government's motion to dismiss in part, *Keene Corp. v. United States*, 17 Cl.Ct. 146 (1989). The United States Court of Appeals for the Federal Circuit, reversed, 911 F.2d 654 (Fed.Cir.1990), and rehearing en banc was granted, 926 F.2d 1109 (Fed.Cir.1991). Upon rehearing, the full

briefings addressing the impact of the above precedential decisions on the instant case. In response, the defendant filed a motion to dismiss claiming a lack of jurisdiction based on the pendency of another pending claim in the federal district court, pursuant to 28 U.S.C. § 1500. Therefore, currently pending before this court are defendant's motion to dismiss, pursuant to 28 U.S.C. § 1500, defendant's motion for summary judgment, and plaintiffs' cross-motion for partial summary judgment.

DISCUSSION

When considering a motion to dismiss, the court may consider all relevant evidence in order to resolve any disputes as to the truth of the jurisdictional facts alleged in the complaint. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed.Cir.1988). The court is required to decide any disputed facts which are relevant to the issue of jurisdiction. *Id.*

The basic standards for weighing the evidence presented by the parties when evaluating a motion to dismiss for lack of jurisdiction in the instant case, pursuant to RCFC 12(b)(1), have been articulated by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit as follows: "in passing on a motion to dismiss, whether on the ground of lack of

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court affirmed. *UNR Indus. v. United States*, 962 F.2d 1013 (Fed.Cir.1992). The United States Supreme Court granted certiorari on October 19, 1992, 506 U.S. 939, 113 S.Ct. 373, 121 L.Ed.2d 285 (1992), and affirmed the opinion of the Claims Court. *Keene Corp. v. United States*, 508 U.S. 200, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993).

jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); accord *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed.Cir.1989).[9] In rendering a decision, the court must presume that the undisputed factual allegations included in the complaint by plaintiffs are true. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d at 746; *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 2492 n. 2, 53 L.Ed.2d 557 (1977).

The burden of establishing jurisdiction is on the plaintiffs. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936); *Pasco Enterprises v. United States*, 13 Cl.Ct. 302, 305 (1987); *Metzger, Shadyac & Schwartz v. United States*, 10 Cl.Ct. 107, 109 (1986). The court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Moreover, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir.1981).

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[9] In general, the rules of this court are closely patterned on the Federal Rules of Civil Procedure. Therefore, precedent under the Federal Rules of Civil Procedure is relevant to interpreting the rules of this court, including RCFC 56. See *Jay v. Sec'y DHHS*, 998 F.2d 979, 982 (Fed.Cir.1993); *Imperial Van Lines Int'l Inc. v. United States*, 821 F.2d 634, 637 (Fed.Cir.1987); *Lichtefeld-Massaro, Inc. v. United States*, 17 Cl.Ct. 67, 70 (1989).

Defendant has moved to dismiss the above-captioned case, arguing that the pendency of claims in another court as of September 18, 1989, the date of filing the complaint in the United States Court of Federal Claims, prevents this court from exercising jurisdiction over the above-captioned case, pursuant to 28 U.S.C. § 1500. Defendant argues that the district court complaint filed by these plaintiffs, in November, 1988, was still pending at the time the instant suit was filed on September 18, 1989, thus depriving this court of jurisdiction. The statute, 28 U.S.C. § 1500, provides as follows:

> Pendency of claims in other courts.
>
> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500.

Congress has been given authority, pursuant to the Constitution of the United States, to define the jurisdiction of the courts. See *Keene Corp. v. United States*, 508 U.S. 200, 207-08, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 (1993). Moreover, "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978).

According to the United States Court of Appeals for the Federal Circuit, the purpose of section 1500 is to "force an election where both forums could grant the same relief, arising from the same operative facts." *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1564 (Fed.Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989). Otherwise stated, "[t]he purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time." *Id.* at 1562. In the Supreme Court decision in *Keene Corp. v. United States*, the Court commented on the difficulty of applying 28 U.S.C. § 1500:

> The statutory notion of comparable claims is more elusive. By precluding jurisdiction over the claim of a plaintiff with a suit pending in another court 'for or in respect to' the same claim, § 1500 requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit. The exact nature of the things to be compared is not illuminated, however by the awkward formulation of § 1500.

Keene Corp. v. United States, 508 U.S. at 210, 113 S.Ct. at 2041.

Prior to the Keene case, the United States Court of Appeals for the Federal Circuit had offered guidance regarding how courts should interpret the term "claim" in the context of 28 U.S.C. § 1500, when it wrote:

> Both the decision in *British American [British American Tobacco Co. v. United States*, 89 Ct.Cl. 438, 1939 WL 4266 (1939), *cert. denied*, 310 U.S. 627, 60 S.Ct. 974, 84 L.Ed. 1398 (1940)] and the decision in *Los Angeles [Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F.Supp. 236,

> 138 Ct.Cl. 648 (1957)] are explicit in their interpretation of the term 'claim' in section 1500. Both reject the argument that 'claim' is based on legal theories. Both hold 'claim' to be defined by the facts. *British American* specifically applied this interpretation to a case involving tort and contract theories, the same theories raised in the instant appeal. A contrary interpretation would defeat the intent of Congress and would allow a plaintiff to bring duplicative actions on the same operative facts. 'The possibility of inconsistent judicial resolution of similar legal issues would then exist and the dual proceedings could result in unfair burden to the defendant, and unnecessary crowding of this court's docket and general administrative chaos.' *City of Santa Clara v. United States*, 215 Ct.Cl. 890, 893 [1977 WL 9595] (1977). Accordingly, we construe the term 'claim' in 28 U.S.C. § 1500 to be defined by the operative facts alleged, not the legal theories raised.

Johns-Manville Corp. v. United States, at 1562. This basic approach was confirmed by the Supreme Court in *Keene Corporation v. United States*, 508 U.S. at 212-14, 113 S.Ct. at 2043.

Subsequently, in *UNR Industries v. United States*, also interpreting 28 U.S.C. § 1500, the federal circuit addressed the chronological issues raised by section 1500, as follows:

> 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims

> Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

UNR Indus. v. United States, 962 F.2d at 1021. In *Keene Corp. v. United States*, the Supreme Court reiterated the concepts outlined in *UNR Industries v. United States*, and stated that when applying the jurisdictional bar imposed by 28 U.S.C. § 1500, this court must adhere to the long-standing principle that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Keene Corp. v. United States*, 508 U.S. at 207, 113 S.Ct. at 2040 (citing *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.)).

In *Keene Corp. v. United States*, the Supreme Court further refined the manner in which two pending cases should be analyzed regarding the application of section 1500, as follows:

> These precedents demonstrate that under the immediate predecessor of § 1500, the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.6 [Citations omitted.]

Id. at 212, 113 S.Ct. at 2042-43. In footnote 6 to the above quote, however, the court stated:

> 6. Because the issue is not presented on the facts of this case, we need not decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500. Cf. *Casman v. United States*, 135 Ct.Cl. 647 (1956); *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (CA Fed.1988).

Id. at 212, 113 S.Ct. at 2043. The unanswered scenario identified by the Supreme Court in footnote 6 of the *Keene* case presents precisely the facts of the instant case.

More recently, the United States Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc. v. United States* seems to have resolved the dispute of whether two cases, in two separate courts, presenting the same facts, but requesting different relief, trigger section 1500.

> For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief. We know of no case arising from the same operative facts in which § 1500 has been held to bar jurisdiction over a claim praying for relief distinctly different from that sought in a pending proceeding.

Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed.Cir.1994). Not only are the words "the same operative facts" and "the same relief" emphasized in the circuit court's language, but the two phrases also are connected by the words "and must."

Thus, pursuant to the language of 28 U.S.C. § 1500, and recent case law interpreting that provision, it is clear that this court may not exercise jurisdiction over an

action if, at the time of its filing, the same plaintiffs have already filed another action in another court based on the same operative facts and requesting the same relief. 28 U.S.C. § 1500; *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed.Cir.1994); *see also UNR Indus. v. United States*, 962 F.2d 1013, 1021 (Fed.Cir.1992), *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. at 208-14, 113 S.Ct. at 2041-43. However, if the relief requested is different, 28 U.S.C. § 1500 is not implicated. *Loveladies Harbor, Inc. v. United States*, 27 F.3d at 1551.

Applying the concepts outlined in *UNR Industries v. United States*, *Keene Corp. v. United States* and *Loveladies Harbor, Inc. v. United States*, in order to determine if the section 1500 jurisdictional bar applies to the instant case, this court must examine whether or not a comparable claim against the United States was pending in another court at the time of filing in this court. The fact that count I of the district court action filed on November 4, 1988, was the only court still pending at the time the instant action was filed is not disputed by the parties. Defendant, in its motion to dismiss, notes that a "district court complaint filed in November, 1988, was still pending at the time this suit was filed on September 18, 1989." Plaintiffs, in their memorandum in opposition to defendant's motion to dismiss for lack of jurisdiction, also concede that "[a]s of September 12[sic], 1989, the filing date of this case, Plaintiffs' only pending claim against the United States was a request [count I] for declaratory relief. *Marks v. United States Army Corps of Engineers*, No. 88-10081-Civ-KING (S.D.Fla.)." Therefore, the existence of a pending case requesting declaratory relief against the "United States or any person . . . at the time when the cause of

action alleged in such suit or process arose. . . . ," pursuant to 28 U.S.C. § 1500, is not disputed by the parties in the suit pending in this court.

Consequently, the court must address the subsidiary issue, whether the claim pending in the United States District Court for the Southern District of Florida, Case No. 88-10081-Civ-KING (S.D.Fla.), was "for or in respect to" the same claim as that pending before this court. In this court, the plaintiffs have filed a one count complaint. Count I of the complaint in the above-captioned case, in its entirety, reads:

TEMPORARY TAKING AGAINST THE ARMY CORPS

Plaintiffs reallege paragraphs numbered 1 through 29 and further state:

> 30. At all times material, Defendant Army Corps improperly exercised jurisdiction over Plaintiffs' property.
>
> 31. Notwithstanding the fact that the Army Corps was acting outside of its jurisdiction, a cease and desist order was sent to Plaintiffs in January, 1973, preventing Plaintiffs from further developing the subject parcels and has continued a pattern of conduct to deny Plaintiffs their property rights.
>
> 32. The Army Corps' improper exercise of jurisdiction over the subject parcels constitutes a temporary taking since the imposition of the cease and desist order in January, 1973 and has continued to date.
>
> 33. As a direct and proximate result of the Army Corps' temporary taking of the parcels,

> Plaintiffs have been denied all economically feasible use and all reasonable beneficial use of their property in violation of the just compensation clause of the Fifth Amendment of the United States Constitution.
>
> WHEREFORE, Plaintiffs demand judgment against the Defendant, The United States, for damages, costs and any other relief that this Court deems appropriate.

It also is important to note that count I of the complaint in this court is the same as count V in the pending district court action (No. 88-10081-Civ-KING (S.D.Fla.)), which was dismissed by that court on August 11, 1989, prior to the September 18, 1989 filing in this court.

By comparison, count I, the sole remaining count in the district court complaint (Case No. 88-10081-Civ-KING (S.D.Fla.)) at the time of plaintiffs' filing of the case in this court, was the claim for declaratory and injunctive relief, as follows:

> COUNT I
> COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
>
> 31. The allegations contained in paragraphs numbered 1 through 26 are realleged.
>
> 32. This is a claim for declaratory, injunctive and other relief to determine the legality and constitutionality of certain actions of the United States including asserting jurisdiction through the army corps over all of plaintiff's property within the city limits of Key West, Florida under 33 U.S.C. §§ 403, 1311(a) and 1344, and thereby preventing use of said property.

33. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1346(a)(2).

34. Based in part on the principle of res judicata, the Corps of Engineers is required to abide by the regulations in effect during December of 1972 and January of 1973, and therefore should be enjoined from requiring permitting of the property on Parcel 34, above the compromise mean high water line.

35. The plaintiffs are not required to exhaust any existing federal or state administrative remedies since resort to such remedies would be futile. Defendant's agents and representatives have repeatedly stated that a dredge and fill permit will not be issued, and thus the plaintiffs are forced to seek judicial relief.

WHEREFORE, plaintiffs request that:

1. The Court declare the defendant without authority to require permitting for the property in question (Parcel 34) and enjoin any further interference in reference to the dredge and fill and paving and use of said property.

2. The Court grant plaintiffs any other relief as may be just and necessary.

3. Plaintiffs demand a jury trial on all issues triable as a matter of right by a jury and imposition of costs and attorneys' fees.

It is quite clear from the complaints filed in both courts that on September 18, 1989, the type of relief sought in the two complaints is distinguishable. The complaint filed in the United States Court of Federal Claims seeks money damages for an alleged taking in violation

of the Fifth Amendment to the Constitution, in addition to costs and any other appropriate relief. Count I of the complaint pending in the district court at the time of the filing of the instant complaint, however, sought declaratory and injunctive relief, in addition to any other relief as may be just and necessary.[10] The catch all phrases, which request costs and any other appropriate relief or any other relief which may be just and necessary, do not change the nature of the two claims, one, a request for compensation due to an alleged improper taking under Amendment V to the Constitution, in this court and the other, a request for declaratory and injunctive relief, in the district court. Clearly, the two types of relief are different, thus diminishing the effect of a section 1500 claim. It is the opinion of this court, therefore, that 28 U.S.C. § 1500 does not act to divest this court of jurisdiction of the above captioned cause of action. Defendant's

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[10] The court notes that in the earlier related action brought in the United States District Court for the Southern District of Florida, Case No. 79-2323-Civ-SMA, the district court judge wrote: That portion of the Motion to Dismiss addressed to the MARKS Defendants' [plaintiffs in the instant case] Counterclaim against the UNITED STATES seeking to have a 'Taking' or inverse condemnation declared and payment thereon is GRANTED without adjudication. The Court of Claims is the proper court to determine the issue of whether the denial of permits constitutes a 'Taking' of the property without just compensation and to determine any relief properly granted under the *Tucker Act*. 28 U.S.C. § 1491. The UNITED STATES as sovereign is immune from any suit except as it consents to be sued. *U.S. v. Testane* [sic], 424 U.S. 392, 399 [96 S.Ct. 948, 953, 47 L.Ed.2d 114] (1976). The mere fact that the 'Taking' claim is asserted in a Counterclaim does not alter the aforegoing.

motion to dismiss for lack of subject matter jurisdiction is, hereby, DENIED.

The court, therefore, proceeds to examine the merits of the parties' cross-motions for summary judgment. Plaintiffs allege that as a matter of law they have been subjected to a temporary regulatory taking under the Fifth Amendment. In support, plaintiffs argue that the actions of defendant rendered Parcels 34 and 38 virtually idle over a 10-year period, thus depriving the owners of all economically viable use of the property, for which they, allegedly, are entitled to just compensation.

Defendant has proposed multiple arguments in its motion for summary judgment as to why plaintiffs' claims for compensation based upon a Fifth Amendment taking must fail. Defendant asserts the following: (1) any allegation by the plaintiffs of a taking of Parcel 38 property below the mean high water line is noncompensable because it falls within the government's navigational servitude; (2) defendant's articulation of a "mere assertion" of jurisdiction over the remaining portion of Parcel 38 by the Corps does not amount to a temporary taking under the Fifth Amendment; (3) no taking could have occurred because the State of Florida had refused to issue a water quality certificate, and, therefore, the denial of the permit by the Corps was "without prejudice" to plaintiffs; (4) plaintiff's claim of a taking of the portion of Parcel 38 above the mean high water line failed to ripen because plaintiffs failed to exhaust their administrative remedies; and (5) plaintiffs failed to comply with the applicable statutes of limitations, in effect, divesting this court of jurisdiction to adjudicate the taking claim. Also, with regard to Parcel 34, defendant argues that any claim

regarding Parcel 34 must fail because such claims were not ripe at the time of filing.

Summary judgment in this court should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of this court is patterned on Rule 56 of the Federal Rules of Civil Procedure (Fed.R.Civ.P.) and is similar in language and effect. Both rules provide that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(c) of the Rules of the United States Court of Federal Claims (RCFC) provides that in order for a motion for summary judgment to be granted, the moving party bears the burden of demonstrating that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Creppel v. United States*, 41 F.3d 627, 630-31 (Fed.Cir.1994); *Meyers v. Asics Corp.*, 974 F.2d 1304, 1306 (Fed.Cir.1992); *Rust Communications Group v. United States*, 20 Cl.Ct. 392, 394 (1990); *Lima Surgical Assocs., Inc. Voluntary Employees' Beneficiary Ass'n Plan Trust v. United States*, 20 Cl.Ct. 674, 679 (1990), *aff'd*, 944 F.2d 885 (Fed.Cir.1991). Disputes over facts which are not outcome determinative under the governing law will not preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202

(1986). Summary judgment, however, will not be granted if "the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury [trier of fact] could return a verdict for the non moving party." *Id.*; *see also Uniq Computer Corp. v. United States*, 20 Cl.Ct. 222, 228-29 (1990).

When reaching a summary judgment determination, the judge's function is not to weigh the evidence, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249, 106 S.Ct. at 2510; *see, e.g., Cloutier v. United States*, 19 Cl.Ct. 326, 328 (1990), aff'd without op., 937 F.2d 622 (Fed.Cir.1991). The judge must determine whether the evidence presents a disagreement sufficient to require submission to fact finding, or whether the issues presented are so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250-52, 106 S.Ct. at 2511-12. When the record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial, and the motion must be granted. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Stated otherwise, if the nonmoving party cannot present the evidence to support its case under any scenario, then there should be no need for the parties to undertake the time and expense of a trial, and the moving party should prevail without further proceedings.

If, however, the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, then the motion for summary judgment should be denied. Any doubt over factual issues must be resolved in favor of the party opposing summary judgment, to whom the

benefit of all presumptions and inferences runs. *Id.*; *see also Litton Industrial Products, Inc. v. Solid State Systems Corp.*, 755 F.2d 158, 163 (Fed.Cir.1985); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed.Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985). Moreover, in the instant case, the court recognizes the "fact intensive" nature of Fifth Amendment taking cases which cautions "against precipitous grant of summary judgment." *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed.Cir.1983).

The initial burden on the party moving for summary judgment, to produce evidence showing the absence of a genuine issue of material fact, may be discharged if the moving party can demonstrate that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *see also Lima Surgical Assocs.*, 20 Cl.Ct. at 679. If the moving party makes such a showing, the burden then shifts to the nonmoving party to demonstrate that a genuine factual dispute exists by presenting evidence which establishes the existence of an element of its case upon which it bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. at 322, 106 S.Ct. at 2552; *Lima Surgical Assocs.*, 20 Cl.Ct. at 679.

Pursuant to Rule 56, the motion for summary judgment may succeed, whether or not accompanied by affidavits and/or other documentary evidence in addition to the pleadings already on file. *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S.Ct. at 2553. Generally, however, in order to prevail, the nonmoving party will need to go beyond the pleadings, by use of evidence such as affidavits, depositions, answers to interrogatories and admissions,

in order to demonstrate that a genuine issue for trial exists. *Id.*

In the above-captioned case, the fact that both the parties argue in favor of summary judgment and allege an absence of genuine issues of material fact, however, does not relieve the court of its responsibility to determine the appropriateness of summary disposition in the particular case. *Prineville Sawmill Co. v. United States,* 859 F.2d 905, 911 (Fed.Cir.1988) (citing *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1391 (Fed.Cir.1987)). "[S]imply because both parties moved for summary judgment, it does not follow that summary judgment should be granted one or the other." *LewRon Television, Inc. v. D.H. Overmyer Leasing Co.,* 401 F.2d 689, 692 (4th Cir.1968), *cert. denied,* 393 U.S. 1083, 89 S.Ct. 866, 21 L.Ed.2d 776 (1969); *see also Levine v. Fairleigh Dickinson Univ.,* 646 F.2d 825, 833 (3d Cir.1981); *Home Ins. Co. v. Aetna Cas. & Sur. Co.,* 528 F.2d 1388, 1390 (2d Cir.1976); *Ishida v. United States,* 31 Fed.Cl. 280, 284 (1994). Cross-motions are no more than a claim by each party that it alone is entitled to summary judgment. The making of such inherently contradictory claims, however, does not establish that if one is rejected the other is necessarily justified. *Rains v. Cascade Indus., Inc.,* 402 F.2d 241, 245 (3d Cir.1968); *Bataco Indus., Inc. v. United States,* 29 Fed.Cl. 318, 322 (1993), *aff'd* 31 F.3d 1176 (Fed.Cir.1994). The court must evaluate each party's motion on its own merit, taking care to draw all reasonable inferences against the party whose motion is under consideration. Mingus Constructors, Inc., 812 F.2d at 1391. After an examination of the record in this case, the proposed contentions of fact submitted by both parties, and the factual findings of

other courts in related litigation, submitted as part of the record, this court has determined that no genuine material facts exist and, therefore, this case is ripe for summary disposition.

For its first argument in favor of summary judgment, defendant asserts that any claim of a taking by the plaintiffs of Parcel 38 property below the mean high water line is noncompensable. Defendant contends that land within the navigational servitude is subject to the exclusive control of the United States and, therefore, not the proper subject of a taking claim.[11]

The navigable waters of the United States have long been considered "public property" and have thus been under the exclusive control of the federal government pursuant to the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3; *United States v. Rands*, 389 U.S. 121, 122-23, 88 S.Ct. 265, 266-67, 19 L.Ed.2d 329 (1967); *Gilman v. Philadelphia*, 70 U.S. (3 Wall) 713, 724-25, 18 L.Ed. 96 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824); *Owen v. United States*, 851 F.2d 1404, 1408 (Fed.Cir.1988); *Confederated Tribes of Colville Reservation v. United States*, 20 Cl.Ct. 31, 40 (1990).

> This power to regulate confers upon the United States a 'dominant servitude,' (citation omitted) which extends to the entire stream and the

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[11] Parcel 38 is the same portion which was involved in the enforcement action filed in the United States District Court for the Southern District of Florida, Case No. 79-2323-Civ-SMA. That enforcement action sought to have the property owners (plaintiffs in this case) remove fill material from navigable waters deposited below the mean high water line on Parcel 38.

> stream bed below the ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

United States v. Rands, 389 U.S. at 123, 88 S.Ct. at 267; *Federal Power Com. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249, 74 S.Ct. 487, 493, 98 L.Ed. 666 (1954); *Owen v. United States*, 851 F.2d at 1408; *Coastal Petroleum Co. v. United States*, 207 Ct.Cl. 701, 707-708, 524 F.2d 1206, 1210 (1975), cert. denied, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982); *Weatherford v. United States*, 606 F.2d 851, 852 (9th Cir.1979). Indeed, it is well settled in the United States Court of Appeals for the Federal Circuit that, in light of the dominant interest in preserving the public right of navigation, the authority of the United States over navigable waters is "supreme." *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1108 (Fed.Cir.1992) (citing *Gordon v. United States*, 211 Ct.Cl. 310, 311, 546 F.2d 430 (1976), *cert. denied*, 430 U.S. 930, 97 S.Ct. 1549, 51 L.Ed.2d 774 (1977)); *Goose Creek Hunting Club, Inc. v. United States*, 207 Ct.Cl. 323, 331, 518 F.2d 579, 583 (1975); *Sherrill v. United States*, 180 Ct.Cl. 914, 917, 381 F.2d 744, 745-46 (1967); *Marret v. United States*, 82 Ct.Cl. 1, 12, 1935 WL 2216 (1935), *cert. denied*, 299 U.S. 545, 57 S.Ct. 8, 81 L.Ed. 401 (1936). Furthermore, "the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone." *United States v. Chicago, M.*,

S.P. & P.R.R., 312 U.S. 592, 596, 61 S.Ct. 772, 775, 85 L.Ed. 1064 (1941); *Owen v. United States*, 851 F.2d at 1408. Thus, upon the determination of Congress to improve or preserve navigation, the navigational servitude defines the appropriate boundaries within which the United States can assert its power to supersede private ownership interest without creating an obligation to pay just compensation under the eminent domain clause of the Fifth Amendment. *Owen v. United States*, 851 F.2d at 1408.

Therefore, that portion of plaintiffs' claim before this court, arising from filling areas of Parcel 38 below the mean high water line, which is located within the navigational servitude, and which was the subject of the 1973 cease and desist order issued pursuant to section 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, creates no obligation on the part of the government to compensate plaintiffs pursuant to the taking provision of the Fifth Amendment to the United States Constitution. That portion of defendant's motion for summary judgment which argues that there can be no taking of the area of Parcel 38 below the mean high water line, within navigational servitude, is, therefore, GRANTED.

The court next addresses defendant's second through fifth arguments on summary judgment, all of which address whether plaintiffs can establish a taking of that portion of Parcel 38 determined to be above the mean high water line and/or of Parcel 34. For its second argument, defendant alleges that its actions in the above-captioned case amount to a "mere assertion" of jurisdiction, which cannot constitute a Fifth Amendment taking unless a permit had been sought and denied. *See Williamson County Regional Planning Com. v. Hamilton Bank of*

Johnson City, 473 U.S. 172, 186-90, 105 S.Ct. 3108, 3116-18, 87 L.Ed.2d 126 (1985); *Conant v. United States*, 12 Cl.Ct. 689, 691 (1987). Defendant further argues that: "Mere issuance of a cease and desist order or assertion of the Corps' regulatory jurisdiction does not constitute a taking." In support, defendant cites to *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

First, defendant's theory that a Fifth Amendment taking does not occur unless a permit has been sought and denied would not even apply to the areas of Parcels 38 and 34 found to be above the mean high water line because they are outside the jurisdiction of the United States and, therefore, are not subject to the requirement that a permit must be sought. Moreover, the portion of Parcel 38 below the mean high water line has been disposed of above, as being within the navigational servitude of the United States.

Second, the extensive record before this court indicates that defendant's conduct in this case amounts to much more than a "mere assertion" of jurisdiction. The record reflects substantial and repeated activity by the Corps, dating back to the cease and desist order in 1973, which prohibited plaintiff from the filling, not only areas of Parcel 38 ultimately determined by the courts to be below the mean high water line and subject to United States exclusive jurisdiction, but also areas ultimately determined to be above the mean high water line in both Parcels 34 and 38. The criminal information, Case No. 73-509-Cr-WM, brought against the plaintiffs in the

United States District Court for the Southern District of Florida and the ensuing enforcement actions in which the Corps sought to compel removal of the fill and restoration of Parcels 34 and 38 both above and below the mean high water line, reflects much more than a "mere assertion" of jurisdiction. Indeed it was not until 1984, approximately eleven years after the initial cease and desist order was issued by the government, when the United States Court of Appeals for the Eleventh Circuit affirmed the opinion of the district court judge, that the mean high water line was defined with finality, *United States v. Marks Dev., Inc.*, No. 79-2323-Civ-SMA (S.D.Fla. Jan. 15, 1982), *aff'd sub nom. United States v. Context-Marks Corp.*, 729 F.2d 1294 (11th Cir.1984). However, although defendant's activity clearly amounts to more than a "mere assertion" of jurisdiction over the property, such a determination does not necessarily mean that an unconstitutional taking has occurred under the facts and circumstances of the case.

Third, defendant contends that because the State of Florida refused to issue a water quality certificate to the plaintiffs after reviewing the merits of the application, the subsequent denial of the permit by the Corps, based on the State's denial, was "without prejudice," thus giving rise to no taking claim against the defendant. In support of this contention, defendant asserts that section 401 of the Federal Water Pollution Control Act ("The Clean Water Act"), 33 U.S.C. § 1341(a)(1), provides that "[n]o license or permit shall be granted if certification has been denied by the State. . . . " Defendant, however, fails to mention in its pleadings that, in the "Findings of Fact" made in the memorandum opinion issued by Judge

Aronovitz, the court found that at the time the State of Florida did not require certification for a project, such as the one projected for Parcel 38:

> 32. According to John Adams, the Army Corps of Engineers has never considered Island in the Sun's dredge and fill permits on its merits. The Corps' denial of Island in the Sun's previous application was based on the State of Florida's denial of a water quality certification. At the time of the fill placement Florida possessed a water quality certification program but the state did not require certification for a project such as the one instituted on Parcel 38.

Although § 1341 of the Clean Water Act makes reference to state law, the defendant should not be allowed to rely on an argument that if there is no state permit requirement, federal law precludes the review of the permitting process. Like Judge Aronovitz in the district court, this court rejects defendant's reasoning and finds that given the facts of the above-captioned case, the denial of a permit by the Corps should not be dismissed summarily, but should be subject to judicial review.

Fourth, defendant claims that any taking claimed by plaintiffs regarding the portion of Parcel 38 above the mean high water line failed to ripen because plaintiffs failed to exhaust their administrative remedies by seeking a permit for the filling of the portion of Parcel 38 above the mean high water line. This court notes that the issue of ripeness was unambiguously decided in the opinion of United States District Court for the Southern District of Florida on defendant's motion to dismiss in Case No. 79-2323-Civ-SMA, as follows:

> Plaintiff raises an issue with regard to exhaustion of administrative remedies by the MARKS Defendants for issuance of prospective permits for development of the land which may not necessarily include dredging and/or filling for purposes such as a boat basin, or for permit requests for future dredging and filling or development in other areas of Parcel 38. This argument normally would have considerable persuasion with the Court as to why the Motion to Dismiss should be granted as to any prospective requested uses or permits not heretofore submitted and not involved in the original Agency action. However, Defendants argue, and at oral argument counsel for Plaintiff acknowledged, that no future permit would be issued for any portion of Parcel 38 unless or until the original dredge and fill had been restored as requested in the complaint. Under such circumstances Defendants argue that to require them to exhaust administrative remedies would be a futile act. The Court agrees.

In general, a plaintiff is not entitled to seek judicial review before following the prescribed administrative remedies. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297, 101 S.Ct. at 2371; *Burlington N.R.R. v. United States*, 752 F.2d 627, 630 (Fed.Cir.1985); *Conant v. United States*, 12 Cl.Ct. at 692. Evidence of the futility of such exhaustion, however, cures any resulting defect in the ripeness of the controversy, thus allowing this court to exert its jurisdiction. *Bendure v. United States*, 213 Ct.Cl. 633, 641, 554 F.2d 427, 431 (1977); *Cienega Gardens v. United States*, 33 Fed.Cl. 196, 207 (1995); *see also Formanek v. United States*, 18 Cl.Ct. 785, 790-93 (1989); *Beure-Co. v. United States*, 16 Cl.Ct. 42, 51-52 (1988); *Loveladies Harbor,*

Inc. v. United States, 15 Cl.Ct. 381, 385-87 (1988); *Parkview Corp. v. Department of Army, Corps of Engineers*, 490 F.Supp. 1278, 1282 (E.D.Wis.1980). Evidence of such futility is clearly evident in the record with respect to Parcels 34 and 38 in the instant case, and is memorialized in the opinion of the United States District Court for the Southern District of Florida in Case No. 79-2323-Civ-SMA. Like the district court, this court finds that defendant should not be allowed to reargue the exhaustion theory.

Fifth, defendant asserts, as an affirmative defense, that the statute of limitations has run as to the only taking claim which was arguably ripe for review, the denial of the permit to fill below the mean high water line. Although defendant is correct in pointing out that the Tucker Act waives sovereign immunity for suits in the Court of Federal Claims "filed within six years after such claim first accrues," 28 U.S.C. § 2501 (1988), defendant is incorrect in its determination of the date from which the statutory six year period should be calculated.

Defendant cites authority to the effect that the statute of limitations begins to run on the date of denial of a permit. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419; *Conant v. United States*, 12 Cl.Ct. 689; *United States v. Byrd*, 609 F.2d 1204 (7th Cir.1979). This precedent, however, is inapplicable to the instant case. The instant case alleges a temporary taking, the duration of which was unknown until issuance of the decision of the United States Court of Appeals for the Eleventh Circuit in 1984. *United States v. Context-Marks Corp.*, 729 F.2d 1294 (11th Cir.1984). It would be unfair to start the running of the statute of limitations from a date prior to final resolution by the courts of

plaintiffs' interest in the property at issue. This issue was addressed by the Court of Claims in *Oro Fino Consol. Mines, Inc. v. United States*, 118 Ct.Cl. 18, 92 F.Supp. 1016 (1950):

> Under the circumstances, it would be unfair if the statute had started running against plaintiff at a time when there was no way of knowing the duration of the interest taken. While not exactly like the case at bar, the [*United States v.*] *Dickinson* [331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947)] case is pertinent because it recognized that the statute of limitations in taking cases does not necessarily begin to run at the first moment that the plaintiff could have brought suit. It was held in the Dickinson case that an aggrieved owner need not bring suit until the consequences of the taking "have so manifested themselves that a final account may be struck."

118 Ct.Cl. at 22, 92 F.Supp. at 1018. In the case at bar, the consequences, particularly the duration of the alleged taking, "manifested themselves" in 1984, when the Eleventh Circuit issued its opinion. *United States v. Context-Marks Corp.*, 729 F.2d 1294 (11th Cir.1984). The court, therefore, rejects defendant's affirmative defense with respect to the statute of limitations.

Next, the court must address the merits of the temporary regulatory taking claim raised by plaintiffs. It is well settled in law that the taking of private property for public use must result in the payment of compensation under the Fifth Amendment to the United States Constitution. The Fifth Amendment provides: "nor shall private

property be taken for public use without just compensation." U.S. Const. amend. V. The purpose of this constitutional guarantee is to prevent the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). The question raised by the plaintiffs is whether they have been subjected to a temporary regulatory taking by government action and, therefore, whether they are entitled to compensation by the government. The ultimate determination of when "fairness and justice" require compensation, however, must be made based on the particular circumstances of each case. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, ___, 112 S.Ct. 2886, 2922, 120 L.Ed.2d 798, 812 (1992); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166 (1986); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958); *Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed.Cir.), *cert. denied*, 474 U.S. 824, 106 S.Ct. 78, 88 L.Ed.2d 64 (1985); *Skip Kirchdorfer, Inc. v. United States*, 26 Cl.Ct. 666, 672-73 (1992).

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789 (1947). In determining whether there has been a taking, it is not essential for the government to

have taken property for its own use. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244, 104 S.Ct. 2321, 2331, 81 L.Ed.2d 186 (1984); *Langenegger v. United States*, 756 F.2d at 1570. A taking can occur whether or not the government takes physical possession of the property, and also can occur simply when the government by its actions deprives the owner of all or most of its interest in the property. *Aris Gloves, Inc. v. United States*, 190 Ct.Cl. 367, 374, 420 F.2d 1386, 1391 (1970). Thus, the United States may be held responsible for a taking even when its action is not the final direct cause of the property loss or damage. *Langenegger*, 756 F.2d at 1570.

Moreover, courts have recognized that just compensation is required for a "temporary" taking under the Fifth Amendment. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The court in *First Lutheran Church* stated that " 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318, 107 S.Ct. at 2388. The Court in *First Lutheran Church* summarized the Constitutional right to compensation for a temporary taking as follows:

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.

> *See Williamson County*, 473 U.S., at 194 [105 S.Ct. at 3120]; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297, n. 40 [101 S.Ct. 2352, 2371, n. 40, 69 L.Ed.2d 1] (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 [52 S.Ct. 267, 269, 76 L.Ed. 637] (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 [13 S.Ct. 622, 630, 37 L.Ed. 463] (1893); *United States v. Jones*, 109 U.S. 513, 518 [3 S.Ct. 346, 349, 27 L.Ed. 1015] (1883). This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 [80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554] (1960).

First Lutheran Church, 482 U.S. at 314-15, 107 S.Ct. at 2385-86.

In determining whether a temporary regulatory taking has occurred, this court should examine three factors, repeatedly set forth by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant, and; (3) the extent to which the regulation has interfered with reasonable investment backed expectations. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Connolly v. Pension Ben. Guaranty*

Corp., 475 U.S. at 224-25, 106 S.Ct. at 1025; *Creppel v. United States*, 41 F.3d 627, 631 (Fed.Cir.1994); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 901 (Fed.Cir.1986), *cert. denied*, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987); *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. at 391. Otherwise stated, the Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), wrote:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [citation omitted]. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see*, [sic] *e.g., United States v. Causby*, 328 U.S. 256 [66 S.Ct. 1062, 90 L.Ed. 1206] (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id.

Regarding the first factor, the character of the government action, the Supreme Court summarized the current judicial approach and its origin, as follows:

> 'Harmful or noxious use' analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially

> advance[s] legitimate state interests'. . . ." [Citations omitted.]

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023-24, 112 S.Ct. 2886, 2897, 120 L.Ed.2d 798, 818 (1992). Subsequently, the United States Court of Appeals for the Federal Circuit wrote: "Courts must inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented." *Creppel v. United States*, 41 F.3d at 631.

Under the second enunciated factor, the economic impact of the regulation, plaintiffs bear the burden of demonstrating that the governmental actions denied the plaintiff of all "economically viable use of his land." *Nollan v. California Coastal Com.*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). In the *Lucas* case, the court stated this principle as follows:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas v. South Carolina Coastal Council, 505 U.S. at 1019, 112 S.Ct. at 2895, 120 L.Ed.2d at 815 (footnote omitted).

Finally, the third articulated factor, the extent to which the regulation has interfered with reasonable investment backed expectations, "limits recovery to owners who can demonstrate that they bought their

property in reliance on the non-existence of the challenged regulation. One who buys with knowledge of a restraint assumes the risk of economic loss." *Creppel v. United States*, 41 F.3d at 632. According to the Supreme Court, "[a]s we have said on numerous occasions, the Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' " *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016, 112 S.Ct. at 2893, 120 L.Ed.2d at 813 (citing *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106).

In the present case, plaintiffs have claimed a temporary taking as a matter of law, alleging that the government actions in this case rendered their property virtually worthless for over ten years, thus depriving the owners of all economically viable use of the property during that period. Plaintiffs contend that "[t]he Property, situated on Florida wetlands, could not be developed or otherwise built upon until it was dredged and filled," and that defendant's refusal to grant the necessary permit stripped plaintiffs of all use of the land. On the other hand, defendant contends that "[i]f there has been an interference with plaintiffs' ability to use or develop their wetlands property, compensation must be denied so long as there are valuable economic rights remaining in the property as a whole."

First, when examining the character of the government action in the above-captioned case, this court acknowledges that the cease and desist order, as well as the permit requirements imposed by the government, did impact on the plaintiffs' stated intention to construct a multi-unit apartment complex and marina on Parcels 38

and 34. However, the regulatory permit requirements and the issuance by the government of the cease and desist order do not, per se, amount to a regulatory taking, unless the regulatory action goes "too far." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800 (Fed.Cir.1993). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *767 Third Ave. Assoc. v. United States*, 48 F.3d 1575, 1580 (Fed.Cir.1995) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)). As stated by the Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27, 106 S.Ct. 455, 458-59, 88 L.Ed.2d 419 (1985):

> Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Plaintiffs rely heavily on portions of Judge Aronovitz' memorandum opinion in the district court case (Case No. 79-2323-Civ-SMA) to establish their version of the character of the government action as a denial

of plaintiffs' complete use of their property. To be sure, Judge Aronovitz wrote:

> In light of the Corps' inability to dispositively determine the location of the mean high water line in January of 1973, the developers of the project were unable to proceed with the project for fear that additional impermissible filling would take place.

And, he further stated:

> The government has argued that the [plaintiffs] . . . were free in January, 1973 to continue development above the mean high water line since the cease and desist order only addressed land below the mean high water line demarcation. Unfortunately, however, the government was unable to inform [Plaintiffs] . . . where that elusive line might be, so the government was inviting [plaintiffs] . . . to risk the possibility of continuing to be in violation of the law. This Court does not believe that this course of action was a feasible alternative or that any reasonably prudent businessman would gamble on the loss of additional time, labor and money.

Judge Aronovitz, however, concluded that:

> Accordingly, this Court orders that the United States of America and the State of Florida are enjoined from requiring prospective permitting of the property on Parcel 38, south of the compromise mean high water line. The [plaintiffs] . . . shall be free to fill and develop the property subject to compliance with all applicable City of Key West requirements and all applicable rules and regulations setting the placement, location, height, density and method or manner of fill;

> conditioned further, that the Marks [plaintiffs] . . . and/or Island in the Sun and/or their successors/assigns cause partial restoration of the area below the compromise mean high water line as ordered herein.

Plaintiffs fail to realize that although Judge Aronovitz found that the government actions might have acted as a hindrance to plaintiffs' intended use of the property, he also concluded, with certain conditions, that plaintiffs are "free to fill and develop the property subject to compliance with all applicable rules and regulations setting the placement, location, height, density and method or manner of fill. . . . " Moreover, in his opinion, Judge Aronovitz did not reach or address whether or not the cease and desist order or the permit requirements amounted to a taking. In sum, plaintiffs' reliance on the findings of Judge Aronovitz is misplaced. The district court findings do not support plaintiffs' claim that the character of the government action denied plaintiffs all economically beneficial uses of Parcels 34 and 38.

Further, in order to assert a Fifth Amendment taking claim pursuant to the Tucker Act, 28 U.S.C. § 1491, a "claimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act, 28 U.S.C. § 1491." *Tabb Lakes, Ltd. v. United States*, 10 F.3d at 802, *see also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed.Cir.1986), *cert. denied*, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987). In other words, to assert a taking claim, the government must have had the authority to regulate the proposed activity. The rationale is that:

> [A] Tucker Act suit does not lie for an executive taking not authorized by Congress, expressly or by implication. *NBH Land Co. v. United States*, 576 F.2d 317, 319, 217 Ct.Cl. 41 (1978); *see Southern Cal. Fin. Corp. v. United States*, 634 F.2d 521, 523, 225 Ct.Cl. 104 (1980), *cert. denied*, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981) ("[B]efore a compensable taking can be found by the court, there must be some congressional authorization, express or implied, for the particular taking claimed.").

Tabb Lakes, Ltd. v. United States, 10 F.3d at 802.

In the instant case, the government actions relating to that portion of Parcel 38 above the mean high water line were found by the district court to have been unauthorized. Judge Aronovitz found that the issuance of the cease and desist order by the Corps directed to activity on Parcel 38 as a whole, without first having defined the mean high water line, had the effect of exercising jurisdiction over portions of the land above the mean high water line which were not within the control of the United States government. As stated by Judge Aronovitz, "the government failed to produce the requisite scientific evidence or data needed to indicate that it could exactly locate the mean high water line for December of 1972." Furthermore, Judge Aronovitz stated: "Had the Corps not intervened in January 1973, without locating the mean high water line the land above the mean high water line could have been developed, and once done, it would have been grandfathered and exempt from the Corps' revised wetlands policy." After adopting the compromise mean high water line adopted by the parties, the judge found that the government did not have the authority to

assert jurisdiction over that portion of the land above the mean high water line and enjoined both the United States and the State of Florida from imposing any permit requirements on Parcel 38 above the mean high water line.

Consequently, the instant plaintiffs are in no position to concede the validity of the government actions in order to maintain a Tucker Act taking claim. Although the error by the Corps in asserting its jurisdiction over the portion of Parcel 38 above the mean high water line possibly might have given rise to due process claim, it does not satisfy the necessary elements to give rise to a taking claim. *Tabb Lakes, Ltd. v. United States*, 10 F.3d at 803.

There also is sufficient evidence in the instant case to demonstrate that there was a legitimate state interest in preserving the quality of water within the area of plaintiffs' land. Judge Aronovitz described the property as follows: "Parcel 38 contains some wetlands which do perform environmental functions. There are mangroves, turtlegrass and salicornia thereon which produce an organic food source known as detritus. These wetlands can serve as a habitat for aquatic organisms and the birds which feed on them." Moreover, the government stated that: "the project as proposed will have definite long-term adverse effects on the water quality of the Class III waters of the immediate waterway area, Cow Key Channel and will be contrary to policy of the Board of the Department of Pollution Control." Therefore, the evidence presented demonstrates that the land at issue serves an important function to the immediate environment and the proposed activity could adversely affect

that property. Such evidence is conclusive of a legitimate state interest.

Plaintiffs also have not met their burden under the second test for establishing a taking claim, that the governmental actions left the plaintiffs' land devoid of all economic viability. Plaintiffs conceded in their responses to defendant's first set of interrogatories that "[w]ith the exception of the second fill project which commenced in June, 1986, no attempt has been made to develop any part of Parcels 34 and 38." Moreover, Lawrence Marks admitted that in addition to the ongoing litigation, plaintiffs did not fill the property above the mean high water line after 1973, before the date of the new wetlands regulations, because he did not have the money, and there was no money to proceed to development because of a recession from 1973 to 1976. Further, it is undisputed that as of September 18, 1989, plaintiffs sold the majority of Parcel 38 for millions of dollars. The consideration received from this sale alone demonstrates the remaining economic viability of the property. Therefore, plaintiffs have failed to demonstrate the type of economic impact resulting from the regulation and the government actions, necessary to demonstrate that the land was void of all economic viability to the extent that a court could find an unconstitutional taking.

Finally, plaintiffs have failed to demonstrate that regulatory and government actions interfered with the reasonable investment backed expectations of the plaintiffs. As discussed above, this factor "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." *Creppel v. United States*, 41 F.3d at 632. It is not

sufficient to suggest that, although a regulation existed, which plaintiffs should have or did know about, the government authorities had not been in the practice of enforcing the regulation. Moreover, the record, as discussed immediately above, demonstrates that plaintiffs still profited from their investment as a result of the sale of the property. Certainly, the taking clause in the Constitution should not be construed to provide reimbursement to investors for unrealized expectations, or for poor investment decisions.

In sum, even giving plaintiffs the benefit of every reasonable doubt, plaintiffs in this case have failed on summary judgment to meet their burden of proof to present facts, beyond the allegations in the complaint, sufficient to prevail on any of the three factors necessary to demonstrate a valid Fifth Amendment temporary regulatory taking claim, or to demonstrate that a genuine issue of material fact exists, sufficient to defeat defendant's motion for summary judgment. In the instant case, the facts have been flushed out in numerous federal courts and in administrative bodies. This court believes that if sufficient facts had been available to bolster plaintiffs' case, they would have been presented to this court.

The character of the government action, while perhaps a hindrance to plaintiffs' preferred, intended use of the land, did not reach the level of an unconstitutional taking. Moreover, while the government actions may have had an economic impact, temporary or otherwise, on the plaintiffs' planned investment in the land at issue, and the land ultimately may not have been used for plaintiffs' intended purposes, that impact did not leave plaintiffs' land devoid of all economically viable use. In

fact, in his October 23, 1986 opinion, Judge Aronovitz of the district court appears to have anticipated future development of the land at issue. Judge Aronovitz set conditions for future development of the land, including that the plaintiffs should not be required to apply for retroactive permits, which suggests that he believed that future development of Parcels 34 and 38 remained a viable option. The defendant also has demonstrated that the government actions were undertaken with a legitimate state interest in mind. Moreover, regarding those portions of plaintiffs' land above the mean high water line, a compensable taking claim cannot lie based on actions undertaken by government officials without authority.

CONCLUSION

After an exhaustive review of the record in the instant case, the court DENIES defendant's motion to dismiss and GRANTS defendant's motion for summary judgment. Plaintiff's cross-motion for summary judgment is accordingly DENIED. The clerk of the court is, therefore, ORDERED to enter judgment in favor of the defendant.

IT IS SO ORDERED.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-5055

LAWRENCE MARKS;
SUN BANK/MIAMI, N.A. and EDWARD A. MOSS, as personal representatives of the estate of Eugene Marks;
MORRIS S. MARLIN, as personal representative of the estate of Paul Marks;
HERMAN MARKS;
IRENE O. MARKS, individually and as personal representative of the estate of Stanley Marks;
MARKS DEVELOPMENT, INC.; and
ISLAND IN THE SUN CONDOMINIUMS OF KEY WEST FLORIDA, INC.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 506-89L

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

Per curiam (PLAGER, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*). See Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

DATED MAY 15 1997 /s/ Jan Horbaly/illegible
Jan Horbaly, Clerk

COSTS: AGainst, Appellants.
PRINTING---------- $480.85
TOTAL---------- $480.85

ISSUED AS A MANDATE: July 23, 1997

(Filed May 15, 1997)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-5055

LAWRENCE MARKS;
SUN BANK/MIAMI, N.A. and EDWARD A. MOSS,
as personal representatives of the estate of Eugene Marks;
MORRIS S. MARLIN, as personal representative
of the estate of Paul Marks;
HERMAN MARKS;
IRENE O. MARKS, individually and as personal
representative of the estate of Stanley Marks;
MARKS DEVELOPMENT, INC.; and
ISLAND IN THE SUN CONDOMINIUMS
OF KEY WEST FLORIDA, INC.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 23, 1997.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: July 16, 1997

By /s/ Alex Van Veen
Alex Van Veen
Staff Law Clerk

cc: JOEL D. EATON
JEFFREY C. DOBBINS

MARKS V US, 96-5055
(CFC – 506-89L)

(Filed Jul. 16, 1997)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-2323-Civ-SMA

UNITED STATES OF AMERICA,

Plaintiff,

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,

Plaintiff/ Intervenor,

vs.

MARKS DEVELOPMENT, INC., JOAQUIN C. PIJUAN, Individually and as Trustee; OSNARDO DRAGO, Individually and as Trustee; LAWRENCE M. MARKS, Individually and as Trustee; EUGENE MARKS, an individual; HERMAN MARKS, an individual; STANLEY MARKS, an individual; PAUL MARKS, an individual; ISLAND IN THE SUN CONDOMINIUMS OF KEY WEST, FLORIDA, INC., and CHARLEY TOPPINO AND SONS, INC.,

Defendants.

_____/

MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Illegible)

THIS CAUSE was heard by the Court in Key West, Florida, from September 1 through September 4, 1981. Considerable testimony was adduced, numerous exhibits

received into evidence, oral argument was heard and post-trial briefs have been received from the parties. Prior to commencement of trial the Court inspected the subject site in the company of counsel for the respective parties and walked the area of Parcel 38, including the berms and generally visited the surrounding sites. After considering the totality of the aforegoing and upon a review of the entire court record and proceedings herein, this Court herewith makes its Findings of Fact and Conclusions of Law.

Nature of the Action

The United States of America seeks a permanent injunction requiring Defendants to remove approximately 20,000 cubic yards of fill material from navigable waters of the United States allegedly placed *below the mean high water line* on property known as Parcel 38 of Plat Book 4, Page 69, Key West, Monroe County, Florida.[1] This fill material was deposited on Parcel 38 in December, 1972, by Defendants Lawrence Marks, Juaquin Pijuan, Osnardo Drago, Eugene Marks, Paul Marks, Stanley Marks, Herman Marks, Marks Development, Inc., and Island in the Sun Condominiums of Key West, Florida, Inc. (collectively referred to as the "Marks Defendants"), and Charley Toppino and Sons, Inc. (hereinafter referred to as "Toppino"). Plaintiff contends that this was an unathorized [sic] deposit of fill in violation of Section 10

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[1] The State of Florida Department of Environmental Regulation intervened a plaintiff for the limited purpose of supporting the claims of the federal government. It did not press any independent claims for violation of state laws.

of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 and § 301(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311(a), commonly known as the Clean Water Act.

Defendants contended that the Plaintiff could not prove that the fill material was placed *below* the mean high water line as it existed in 1972 and also asserted affirmative defenses of statute of limitations, laches and estoppel.

The Marks Defendants asserted a counterclaim against the United States of America and Plaintiff-Intervenor, the State of Florida Department of Environmental Regulation, seeking injunctive relief from prospective permitting of the property on Parcel 38 *above* the mean high water line. The Marks Defendants also proposed an alternative plan regarding restoration of the subject property, in the event that the Court found some restoration necessary.

Findings of Fact

1. On June 13, 1972, Lawrence Marks purchased a 1/2 undivided interest in Parcel 38 in Key West, Florida ("the property"), on behalf of himself and his uncles, Eugene, Paul, Stanley and Herman Marks (collectively called "Marks Brothers"). As of the same date, Osnardo Drago and Joaquin Pijuan each owned a 1/4 undivided interest in the property, as trustees.

2. Parcel 38 is in a tidal area adjacent to the Key West Airport, within the boundaries of the City of Key West, Florida, and enclosed by Roosevelt Boulevard,

although the entire parcel is not subject to tidal fluctuations. The property abuts the Riviera Canal on the north, a man-made waterway subject to the ebb and flow of the tide, and therefore the northern portion of the property is subject to tidal fluctuations, being a low-lying, inland, salt marsh area. The property is characterized by a prevalence of wetland vegetation, including mangrove trees and a variety of seagrasses. On the southern portion of the property there are areas of uplands. Parcel 38 is roughly rectangular and consists of approximately 52 acres, with its northern boundary running 900 feet along Riviera Canal and its western boundary approximately 2400 feet in length. In the southwest area there is and intrusion by an extension of an abandoned runway from the nearby Key West International Airport and one or more of 4 or 5 abandoned, former Navy concrete blimp pads.

3. Presently, title to the property is vested in Marks Development, Inc., which is owned 60% by Lawrence Marks and 40% by the Marks Brothers. The company's sole asset is Parcel 38.

4. Pursuant to an intention to develop said property as a multi-unit apartment complex and marina, in accord with the Master Plan of the City of Key West and its applicable zoning regulations, Defendants applied for and received, on or about November 1, 1972, a dredge and fill permit from the City of Key West.

5. At the time the fill operation was commenced in November and December of 1972, the Randall Act [F.S. 253.135(3)] was in full force and effect and this Act

exempted property within Key West from state requirements for dredge and fill permits.

6. At the time the fill operation was commenced in November and December of 1972, the Department of Army Corps of Engineers did not assert jurisdiction over any property *above* the mean high water line. The Corps of Engineers historically had not exercised its full jurisdiction in the area of the fill, within Roosevelt Boulevard, and had not been requiring permits to fill *below* the mean high water line in this area.

7. In 1972, Mr. Osnardo Drago, a representative of Island in the Sun Condominiums of Key West, Florida, Inc. (hereinafter "Island in the Sun"), contacted Defendant Toppino to inquire about the costs for renting certain types of equipment and buying fill material from Toppino. Mr. Drago and representatives of Toppino arrived at a stated amount of money to be paid for the rental of equipment and the purchase of fill material.

8. The agreement between Mr. Drago and Toppino was as follows: the equipment was rented for an agreed amount of money per day and the fill material was to be sold for an agreed amount per truckload; the price of the fill material per truckload included delivery of the material to the project site; the price of the equipment rental per day included the salary for the operator of the equipment.

9. Subsequent to the contact between Mr. Drago and Toppino, Mr. Lawrence M. Marks, another representative of Island in the Sun discussed the agreement with Frank P. Toppino, president of Toppino, and indicated his approval of it.

10. Mr. Drago and Mr. Marks, as representatives of Island in the Sun, instructed Frank P. Toppino as to where the fill material was to be spread or placed, and Mr. Toppino, in turn, instructed the equipment operator. The instructions were to spread or place the fill along flag markers as a road (berm). The flag markers were placed at the project site by Phillips & Trice, Inc.

11. The equipment operator spread or placed the fill material at the project site according to the instructions of Mr. Drago and Mr. Marks. Toppino did not have any responsibility for, or control over, where the fill material was placed at the project site. The equipment operator spread or placed the fill material at the project site according to the instructions of Mr. Drago and Mr. Marks.

12. The only agreement between Mr. Drago and Mr. Marks, as representatives of Island in the Sun, and Toppino was for the rental of certain equipment and the sale of fill material.

13. In January, 1973, Toppino was paid $50,395.97 by check drawn on account of Island in the Sun for the rental of the equipment and the sale of fill material used at the project site.

14. The filling took place during December, 1972, when the fill operation was begun and a perimiter berm completed, during the period when the Randall Act was still in effect.

15. On January 24, 1973, the Corps of Engineers sent a cease and desist telegram to Thomas Carlos concerning the placement of fill on the property. This telegram was

followed by letter dated April 9, 1973, from the Corps of Engineers concerning the filling.

16. The United States government entered into a stipulation in a criminal information proceeding in the U.S. District Court, Southern District of Florida, charging unauthorized filling and that Island in the Sun was the party responsible for any alleged infractions. That stipulation was presented to U.S. District Judge W. O. Mehrtens in the case of *United States v. Island In the Sun Condominiums of Key West, Florida, Inc.*, Case No. 73-509-Cr-WM.

17. On August 16, 1973, Island in the Sun plead *nolo contendere* to the criminal information. A stipulation was signed by the attorney for defendant corporation and the Assistant United States Attorney. The corporation was fined $500.00.

18. An application for a permit to dredge a marina in the area bounded by the fill was submitted by Charles Netter on behalf of the corporation in July, 1973. This application was considered by all parties to be an after-the-fact permit application. The corporation also applied to the State of Florida for water quality certification. Lawrence Marks, as trustee, and Thomas Carlos, as trustee, as property owners, designated Charles Netter, Esquire as agent to apply for all necessary permits. Victor Stosik, an associate in Mr. Netter's firm, handled most correspondence with the Corps of Engineers. Lawrence Marks was aware that Mr. Stosik was representing Island in the Sun and did not object to such representation. In

1974, the State of Florida denied water quality certification, and based upon that denial, the Corps of Engineers denied the corporation's permit application.

19. The State of Florida held an administrative hearing on the permit application on April 4, 1975, and on January 27, 1976, the Secretary of the Florida Department of Environmental Protection Regulation issued a final order denying water quality certification and the permit. That order was affirmed by the Board of Trustees of the Internal Improvement Trust Fund on August 9, 1976. The First District Court of appeals for Florida upheld the state's action on May 3, 1977, and on October 10, 1977, the Florida Supreme Court denied a writ of certiorari.

20. The Defendant Marks Development, Inc. filed an application for an after-the-fact permit concerning the fill which is disputed here with the Corps of Army Engineers. On August 13, 1981, the United States Corps of Army Engineers refused to consider that permit on the ground that this litigation was pending.

21. The area covered by the berms in question either above or below the mean high water line is in doubt. However, evidence has been introduced showing it to be about three acres. This represents less than 10 percent of the total acreage of Parcel 38. This is the area that was filled in December, 1972.

22. The corporation known as Island in the Sun Condominiums of Key West, Florida, Inc., is a bona fide Florida corporation.

23. There is extensive development, both commercial land residential, within the area enclosed by Roosevelt Boulevard. According to the testimony of Charles Schneppel, an Army Corps biologist, and Frank Toppino, a forty-year resident of Key West and the area's main source of fill materials, there has never been a major restoration action within the area encompassed by Roosevelt Boulevard. In addition, Mr. Toppino testified that at the time the fill was placed on Parcel 38 he was aware of no state or federal permit requirements.

24. At the time the fill was physically placed on the subject property neither the State of Florida nor the United States government required a permit for the filling or property *above* the mean high water line.

25. Prior to proceeding with the fill operation, Island in the Sun received a city permit for the project and it received assurances from Charles Aguero, an official of the City of Key West, that this permit was the only permit required. The projected development of Parcel 38 fully complied with the requirements and the purposes of the Master Plan for the City of Key West.

26. The fill tickets that were issued by Charley Toppino & Sons at the fill site indicate that all filling was completed by December 31, 1972. Upon receipt of the Corps cease and desist order, Island in the Sun promptly stopped all fill activity and complied with every Corps directive throughout the eight and one-half year period.

27. At the time that the cease and desist order was issued, the Corps was unable to make a definitive determination as to the location of the mean high water line. The first time that a professional surveyor attempted to

determine the location of the mean high water line was in November of 1978, and this survey was commissioned by Context Industries.

28. The original cease and desist order did *not* preclude filling of property *above* the mean high water line since the Corps did not exercise jurisdiction over land above the mean high water line. Had not the Corps intervened in the subject property by issuing its cease and desist order at a time when there was no precise determination of the mean high water line, then the property filled above the mean high water line would have been grandfathered in and *exempt* from the Corps' subsequent 1975 wetlands policy.

29. During correspondence between the respective parties in this action, it was agreed that there would be a compromise and accepted mean high water line. This compromise mean high water line was indicated diagramatically in a letter sent by John Adams (Chief of the Regulatory Review Board for the Army Corps of Engineers). Mr. Adams confirmed the Corps agreement to the location of this compromise mean high water line during his trial testimony.

30. The Corps' demand for a total restoration of *Parcel 38* by means of removing the existing fill is inconsistent with the Corps agreement to the placement of three narrow breaks in the berm located on *Parcel 34*, the property which is directly adjacent and *contiguous* to the eastern boundary of Parcel 38. The Corps agreed to partial restoration of *Parcel 34* in 1975 and the Corps file indicates that Corps biologist, Victor Anderson, agreed

that the limited restoration would foster the Corps' ecological and biological objectives in this essentially inland marsh area.

31. In light of the Corps' inability to dispositively determine the location of the mean high water line in January of 1973, the developers of the project were unable to proceed with the project for fear that additional impermissible filling would take place.

32. According to John Adams, the Army Corps of Engineers has never considered Island in the Sun's dredge and fill permits on its merits. The Corps' denial of Island in the Sun's previous application was based on the State of Florida's denial of a water quality certification. At the time of the fill placement Florida possessed a water quality certification program but the state did not require certification for a project such as the one instituted on Parcel 38.

33. Tidal fluctuations and the free exchange of aquatic organisms can be restored to the land north of the south berm without requiring complete restoration via the removal of all existing fill.

34. Testimony has been heard indicating that total restoration, including the removal of all fill materials, would cost approximately ninety thousand ($90,000) dollars, whereas the free-flow of tidal waters, which would permit the free exchange of nutrients, planktonic and free swimming organisms between the Riviera Canal and the impounded area, could be accomplished for as little as five thousand to six thousand ($5,000-$6,000) dollars.

35. Some of the trial testimony indicated that it was very probable that many mangroves growing on the edge of and on the berms would be destroyed by the use of a backhoe and other heavy machinery needed to effectuate a total fill removal.

36. Mean high water is a term used to designate the arithmetic average of the height above mean sea level of all high tides over a period of approximately 18.6 years. Mean high water at a given geographic location is determined by the establishment of interim tidal stations and measuring short term simultaneous differences between the readings at those stations and the readings at the operating stations which were established more than 19 years prior to the current measurements. By applying known constants for the 19 year station to the shorter term stations, the equivalent of a 19 year value is interpolated.

37. Parcel 38 contains some wetlands which do perform environmental functions. There are mangroves, turtle grass and salicornia thereon which produce an organic food source known as detritus. These wetlands can serve as a habitat for aquatic organisms and the birds which feed on them.

The Island of Key West

38. From the various aerial photographs, surveys and maps introduced into evidence such as Plaintiff's Exhibit 4, it can be ascertained that the City of Key West is an island city. It is approximately 1½ miles in its north/south diameter stretching from the Atlantic Ocean to the Gulf of Mexico, and approximately 3 to 3½ miles

wide along the east/west axis. Land is precious. When it expires, there is no more. According to Plaintiff's Exhibit 6, which is the U.S. Coast and Geodetic Survey for 1935, at page 2, the population of Key West in 1935 was 13,000 people heavily concentrated in the northwesterly portion of the island. The Court takes judicial notice that the 1970 U.S. census relating to this city which has existed for more than 100 years as a municipality (and one of only three (3) in Monroe County, Florida), states a population of 29,300. Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7 (the Geodetic Survey for the year 1943), show the steady growth of habitation eastward on the island and the construction of Roosevelt Boulevard encompassing the eastern side of the island.

39. Plaintiff's Exhibits 6, 7, 26, 28 and 65, all refer to and show man-made creations. West of Parcel 38, within the so-called salt pond area (the descriptive term used to generally describe the nature and character or condition of the area), is an abandoned government missile base. Who built it and who filled in the land? The Plaintiff – United States of America. Intruding into and just south/southwest of Parcel 38 is the runway and 4 or 5 abandoned, concrete blimp pads. Who placed them there and dug up the mangroves to do that? The Plaintiff – United States of America. Who build Roosevelt Boulevard and dug up the area for filling the boulevard, as well as the mangroves that were displaced in the process and the animal life/fish life and habitat disturbance? The Plaintiff – United States of America. Who filled in such Keys as Dredgers Key and Fleming Key (*see* Plaintiff's Exhibit 7, page 2, *et seq.*) as United States Naval reservations? These

entire man-made islands were dug and filled and mangroves displaced with consequential ecological impact by the Plaintiff United States of America.

40. There is nothing inherently wrong with any of the aforegoing projects by the United States of America and it should not be deemed that the Court is condemning any of the aforegoing. To the contrary, each individual project was necessary in the public interest – but nevertheless, it does go to the equities when a different standard is sought to be applied where a private situation is involved.

41. The historical lack of exercise of jurisdiction by the United States within the area encompassed by Roosevelt Boulevard is thus expressed in Defendants' Exhibit 1 – the 1973 Stipulation between the United States of America and Island in the Sun in the criminal proceeding, to-wit:

> 4. The fill was placed by the Defendant corporation during December, 1972 after obtaining an appropriate fill permit from the City of Key West. The Corps of Engineers historically had not exercised its full jurisdiction in the area of the fill. The filling of land enclosed by Roosevelt Boulevard has taken place in the apparent belief that the Corps of Engineers fill permits were not required. It appears that the Defendant corporation proceeded in good faith on a representation from the City of Key West, that no Federal permit was required. This position and belief is evinced by the advice received by the Defendant corporation from a City of Key West official upon applying for the requisite authority to undertake the filling of the land.

5. The Defendant corporation ceased its filling upon receiving notice from the Corps of Engineers to cease and desist and has not taken any course of action which might aggravate the circumstances.

6. The parties recognize that these criminal proceedings are not intended or well-suited to determining the public interest issues arising from the development of the property. The parties therefor have reframed [sic] from addressing themselves to those issues. However, to the extent applicable, it is felt that the conclusions set forth in a Corps of Engineers letter to the Interior Department are analogous in their application to the property herein issue. (See attached letter dated March 21, 1973 from Major General J. W. Morris to John C. Whitaker). The public interest will be best served through the procedures to be complied with in the processing of an after-the-fact permit, which was submitted on June 14, 1973.

42. The letter above-referred to as citing an analogous situation is attached to the Stipulation and dated March 21, 1973. It refers to a fill operation within the boundaries of Roosevelt Boulevard, similar to the subject Parcel 38, and contains confirmation of the Corps Policy with regard to developments within Roosevelt Boulevard boundaries at that time – approving same.

43. Also introduced into evidence is Defendants' Exhibit 2, which consisted of the proceedings at the time a plea of *nolo contendere* was taken in the criminal proceedings on August 16, 1973, before the late William O. Mehrtens, United States District Judge. Judge Mehrtens certainly cannot be accused of taking a "soft" position

with regard to environmental or ecological matters as illustrated by his rulings in cases such as *Moretti, infra, Sexton Coves, infra,* and others. At page 8 of Defendants' Exhibit 2, Judge Mehrtens made this statement with regard to Parcel 38:

> I think the Corps of Engineers ought to give you a permit to fill that land in there. It doesn't do anything in the world but breed mosquitoes. That is all in the world it does. It isn't good for anything, really; and to that extent it is a health hazard. You get to the airport early in the morning and you have mosquitoes all over the place. It is just uncomfortable. Apparently the City has no way that they can control that situation. I understand that they spray and everything but actually control the situation. It is land that could be utilized; it would be of benefit to those people that own it, but it would be of benefit and in the public interest – and I really feel it – that that part of it should be permitted to be filled. By that I am not condoning a lot of the other dredging and filling and things out into the Bay. But this is a little different situation because this is basically an inland salt marsh, really and truly.
>
> While it does have canals with tidal water in it, I would hate to see it just go to waste in the interest of ecology, because I don't think that it has any ecological impact on anything.
>
> * * *
>
> Well, Key West has gotten to the point now where every foot of available land is getting worth more and more and there isn't enough available land to satisfy the growth of the city. Actually, that is about right, isn't it?

* * *

. . . I can't do anything less than that, but I fully believe that you proceeded in good faith.

And as I say, based upon what knowledge I have of the area, I would like to see the thing filled in, because it doesn't do a thing in the world, because right now it creates a breeding ground for mosquitoes, and it is an unsightly thing that could be made into an asset to the city.

CONCLUSIONS OF LAW

This Court has jurisdiction subject to the provisions of the Federal Water Pollution Control Act, known as the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

The main claim in this litigation was the government's prayer for restoration of the area *below* the mean high water line. The government asserted this claim under the auspices of 33 U.S.C. §§ 403 and 406 and the line of Fifth Circuit cases upholding the District Court's power to fashion suitable restorative relief by means of mandatory injunction. *See, e.g., United States v. Morretti,* 526 F.2d 1305 (5th Cir. 1976) (Morretti II); *United States v. Sexton Cove Estates,* 526 F.2d 1293 (5th Cir. 1976); *Weiszmann v. United States,* 526 F.2d 1302 (5th Cir. 1976); *United States v. Moretti,* 478 F.2d 418 (5th Cir. 1973) (Moretti I).

The instant case appears to this court to be truly unique. It is not the usual or customary Florida Keys dredge and fill case. The facts are distinguishable from all

of the above-referenced cases and there are no facts in this case to substantiate the allegation that the developers employed any form of "Self-Help for the Impatient." *Moretti I*, 478 F.2d at 427. The "Self-Help" phraseology was originally coined in *Moretti I* because the developer blatantly flaunted an Army Corps cease and desist order and continued to dredge land below the mean high water line after he was ordered to stop. *Id.*, at 427. This same scenario was repeated by the developers in the *Sexton Cove* case wherein they continued their unauthorized dredging activity despite receipt of a letter from the Corps indicating that a permit was required. *Sexton Cove, supra*, 526 F.2d at 1300. The developers in the *Weiszmann* case were likewise guilty of impatience and the court viewed this impatience with considerable disfavor. Weiszmann was informed by the Corps that a permit might be needed for his project and the Corps proceeded to conduct a navigability study to enable it to make a final determination. *Weiszmann v. United States*, 526 F.2d at 1303. After three months of study and no word, Weiszmann grew weary and decided that ample time had passed and he resumed his dredging activity. *Id.*, at 1305.

The transgressions and poor faith exhibited in *United States v. Weisman*, 489 F.Supp. 1331 (M.D. Fla. 1980), *aff'd*, 632 F.2d 891 (5th Cir. 1980) and *Bankers Life & Casualty Co. v. Village of No. Palm Beach*, 469 F.2d 994 (5th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973), were substantially less blatant than those already recited but nonetheless neither of those parties could claim the same "clean hands" as the Defendants in the case *sub judice*. In the *Weisman* case the defendant was informed that the Corps would not issue a permit for his project and that his only chance for

authorization was to prove he had "no practical alternative site and that the project would not cause 'permanent unacceptable disruption of the aquatic ecosystem.' " *United States v. Weisman, supra,* 489 F.Supp. at 1342. He elected to do neither, but instead elected to continue the development and in the words of Judge Scott "by commencing his project across wetlands he plunged himself into a morass of a different sort from which the principles of equity offer no escape." *Id.*, at 1342.

The *Bankers Life* case is somewhat different from the previously mentioned cases in several ways but its overall importance to the case at bar is similar. First, *Bankers Life* did not directly involve an estoppel claim by the developers against the government, but rather the court applied an estoppel theory *against* the developer in favor of the government. *Bankers Life* was seeking an extension to an existing permit but upon the request of the Florida State Board of Trustees of the Internal Improvement Trust Fund of Florida, the Corps deferred consideration of the extension until a local fill permit was received. During the interim period the Corps' regulations changed and as a result of the deferral period, *Bankers* did not receive a permit extension and it challenged this denial. The trial court granted *Bankers* injunctive relief but the Fifth Circuit was not as sympathetic to its plight. In effect the Court held that *Bankers* was estopped from challenging the intervening regulations because of its inactivity and failure to safeguard its position. The Court stated:

> Bankers, so far as this record discloses, was content to take no legal action to test the correctness of the Trustees' position or the Village's position for more than five years after being

> notified that the Corps of Engineers would not renew so long as objection was filed by the state agency involved. . . . Bankers is not in a position to complain if, during the period of its own lack of effort to force the matter to an issue, the requirements on the Corps of Engineers for the issuance of a permit, although still couched in terms of "navigation," included by the time the lawsuit was filed, much more stringent requirements.

Bankers Life, supra, 469 F.2d at 998. Applying equitable principles to the *Bankers* situation the Court concluded that the plaintiffs' inactivity for five years justified the retroactive application of the Corps' regulations. Clearly, the Defendants in the instant case are not guilty of the inactivity which cost the plaintiffs in the *Bankers* case so dearly. The record reflects that the Defendants' placement of fill occurred at a time when the corps was not exercising its legislatively authorized jurisdiction and for all intents and purposes, regulation within Roosevelt Boulevard was non-existent. Furthermore, upon being informed of the Corps' objection the project was discontinued and no fill or dredge operations took place after December 31, 1972.

As previously noted, in opposition to the government's request for restoration relief, the Defendants have asserted numerous affirmative defenses and counterclaims. One of the Defendants' affirmative defenses is equitable estoppel. This defense has been confronted in cases similar to this in this District, the Middle District of Florida, and the Fifth Circuit Court of appeals many times before. *See, e.g., United States v. Sexton Cove Estates, supra; Moretti I; Weiszmann v. United States, supra; Bankers*

Life & Casualty Co. v. Village of No. Palm Beach, Fla., supra; United States v. Weisman, supra. In each of the above-cited cases, the courts rejected the estoppel defense but they did so after reviewing the totality of the equitable principles involved. Thus, it is apparent that the defense of equitable estoppel cannot be summarily dismissed and a resolution of the allegation requires a case-by-case analysis.

This Court is not disposed to agree with the government's contention that Defendants' estoppel argument can be summarily dismissed by virtue of the old axiom that government cannot be estopped when acting in its sovereign capacity. *See, e.g., Hicks v. Harris,* 606 F.2d 65, 68 (5th Cir. 1979); *United States v. State of Florida,* 482 F.2d 205 (5th Cir. 1973). The Corps' failure to exert jurisdiction over property such as Parcel 38 was hardly conduct "protecting" the public interest. Therefore, this Court concludes that the holding of *Utah Power & Light Co. v. United States,* 243 U.S. 389 (1917) and *United States v. State of Florida, supra,* are inapplicable to the instant case. On the contrary, this Court is cognizant of a number of cases stating that equitable estoppel may be applied against government in order to prevent injustice *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978); *United States v. Sunset Cove, Inc.,* 514 F.2d 1089 (9th Cir. 1975); *Santiago v. INS,* 526 F.2d 488 (9th Cir. 1975); *C. F. Lythe Co. v. Clark,* 491 F.2d 834 (10th Cir. 1974); *United States v. Lazy F. C. Ranch,* 481 F.2d 985 (9th Cir. 1973); *United States v. Georgia Pacific Co.,* 421 F.2d 92 (9th Cir. 1970). Noted authority Professor Kenneth Davis has recognized this trend toward the application of equitable estoppel to government in his highly regarded text on administrative law. K.

Davis, *Administrative Law of the 70's*, § 17.01 at 399 (1976). Florida courts have also approved of the application of equitable estoppel to governmental bodies. *The Hollywood Beach Hotel Co. v. The City of Hollywood*, 329 So.2d 10 (Fla. 1976); *Sokolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963); *Bregar v. Britton*, 25 So.2d 753 (Fla. 1954); *Texas Co. v. Town of Miami Springs*, 44 So.2d 808 (Fla. 1950). In short, given the peculiar *equities* present in the instant case, there is ample reason to estop the government from obtaining *total* restoration of the subject property.

Standards for Fashioning Restoration

On February 17, 1976, the Fifth Circuit handed down a trilogy of Corps related dredge and fill cases in which it enunciated the following guidelines for fashioning restoration:

> (1) The government should present to the court a complete, comprehensive evaluation of both the environmental factors involved and the practicalities of the situation, *Moretti II* at 1310, *Weiszmann* at 1304.
>
> (2) The defendant shall be afforded the opportunity to present its objections to the feasibility and environmental advisability of the government's proposed restoration plan. *Moretti II* at 1310.
>
> (3) The restoration plan presented by the government should attempt to confer maximum environmental benefits while, at the same time, be tempered with a "touch of equity" considering the degree and kind of wrong and the practicality of the remedy. *Sexton Cove Estates* at 1301.

(4) The plan should not be beyond the resources of the developer. *Sexton Cove Estates* at 1301.

The government in this case has continually maintained that complete restoration by means of removing all fill material is appropriate. The Court disagrees. A number of courts have wrestled with the problem of fashioning restorative relief and this Court agrees with those that have sought to adhere to the environmental and ecological purposes of the Federal Waters Pollution Control Act but it also whole-heartedly endorses those that have recognized the need to temper their decisions with a touch of equity. *See, e.g., United States v. Martin,* 517 F. Supp. 211 (D. S.C. 1981); *Avoyelles Sportsmen's League v. Alexander,* 73 F. Supp. 525 (W.D. La. 1979); *United States v. Sexton Cove, supra; United States v. Lazy F.C. Ranch, supra; United States v. Bailey,* 467 F. Supp. 925 (E.D. Ark. 1979); *Sierra Club v. Leslie Salt Co.,* 412 F. Supp. 1096 (N.D. Cal. 1976); *United States v. Lewis,* 355 F. Supp. 1132 (S.D. Ga. 1973).

This Court does not align itself with those that insist that the "maximum environmental benefits" always requires the total exclusion of man. Applying the accepted standards of this Circuit for restoration to the facts of this case does not justify the removal of all fill materials. This Court concludes that a comprehensive evaluation of both the environmental factors and the practicalities of the situation dictate that property north of the compromise mean high water line be restored by the placement of breaks in the north, east and west berms or some comparable arrangement that will restore tidal fluctuations to the impoundment and promote the free

flow of aquatic organisms. A similar restoration plan was very recently approved in *United States v. Martin*, 517 F. Supp. 211 (D. S.C. 1981). In the *Martin* case, the Court held that an illegally constructed impoundment should continue to exist "subject to a reasonable management plan which would allow the seasonal entrance and exit of marine animals and fishes . . . " *Id.*, at 218. Likewise, a similar restoration plan was approved in 1975 by the Corps on Parcel 34, contiguous to the subject Parcel 38.

Of all the prior fill permit cases the case at bar is most analogous to *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525 (W.D. La. 1979) and *United States v. Martin, supra.* In attempting to fashion the appropriate injunctive relief in each of those cases the trial courts adhered to equitable principles. The *Martin* case was previously discussed and it suffices to note that the Court decided that since the defendants made no effort to thwart the Corps' permit system a reasonable management plan providing free-exchange of aquatic life was appropriate. In *Avoyelles*, the Corps modified a preliminary determination regarding the property's wetlands status and as a result of the modification the defendant's clearing operation was said to be improper. Once again the court mitigated the Corps' requested injunctive relief noting that the defendants had not acted in bad faith and they attempted to comply with all Corps directives. Considering the particle [sic] facts of the instant case in light of the prior decisions wherein restoration was largely mitigated by equitable considerations this Court is compelled to heed the words of Chief Justice Burger, sitting as a Circuit Court Judge:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted.

Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207, 1217-18, 93 S.Ct. 1, 7, 34 L.Ed. 2d 21 (Burger, Circuit Justice, 1972). *See also Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F.2d 927 (2nd Cir. 1974).

Location of the Mean High Water Line

A threshold requirement for the government to receive any restoration relief is that to prove that the fill material was placed below or bayward of the mean high water line. *Moretti I, supra*, 478 F.2d at 429. The government has recognized this fact and a number of witnesses addressed the issue.[2] The bulk of this testimony related to approximations of the mean high water line arrived at after the fill was placed on the property. The first time that a professional survey of the property was conducted was in November of 1978 and that survey was performed at the behest of Context Industries.

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[2] The government has also repeated in its pleadings and in open court that the restoration it seeks covers only property located below the mean high water line. (See Government's Pre-Trial Memo, p.3, n.5.).

This Court previously noted that courts throughout this country have accepted expert testimony stating that a true and accurate determination of the mean high water line takes 18.6 to 19 years. *United States v. California,* 382 U.S. 448 (1966); *Borex Consolidated v. City of Los Angeles,* 296 U.S. 10 (1935); *United States v. Ray,* 423 F.2d 10 (5th Cir. 1970); *State Board of Trustees of Internal Improvement Fund v. Wakulla Silver Springs Co.,* 362 So.2d 706 (Fla. 3rd DCA 1978); *cert. denied,* 368 So.2d 1366 (Fla. 1979). The government failed to produce the requisite scientific evidence or data needed to indicate that it could exactly locate the mean high water line for December of 1972. *see generally, State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Charley Toppino & Sons,* 514 F.2d 700 (5th Cir. 1975). The government relied on general scientific testimony that the mean high water line for the Riveria Canal had stayed approximately the same since the mid-1950's. The government then extrapolated that this apparent stability in the area could justify its assertion that the 1978 Survey by Jack Phillips was an accurate depiction of the mean high water line for December, 1972.[3] This extrapolated method of determining the mean

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[3] A similar situation regarding the mean high water line existed in the case of United States v. Martin wherein a six year lapse existed between the Corps' cease and desist order and the first professional survey. The court stated in its opinion that the government bears the burden on this issue and despite the existence of the 1979 survey the court stated that the testimony of the mean high water line in 1973 was "doubtful." United States v. Martin, 517 F.2d at 216.

high water line in a case where its location is of paramount importance is inapposite to the Fifth Circuit decision of *Rhoads v. Virginia-Florida Corp.*, 549 F.2d 985 (5th Cir. 1977). In *Rhoads* the court held that inexact proof of the mean high water line was fatal to plaintiffs' cause of action for negligence and private nuisance arising from the construction of a sea wall. There is no reason not to hold the government to the same stringent standard of proof when it seeks to deny a person or corporation the beneficial use of their property.

This Court is not the first to be confronted with the problem of locating the mean high water line. In fact in the original trial of the *Moretti* case, Judge Mehrtens was asked to resolve the mean high water line issue. *United States v. Moretti*, 387 F. Supp. 1404 (S.D. Fla. 1975). In light of the difficulty in trying to locate what sometimes can be an elusive line, Judge Mehrtens decided to accept a mean high water line demarcation proffered by the developers on their application during the permitting process. The instant case's dispute regarding the mean high water line is more easily resolved because the parties themselves agreed to accept a compromise mean high water line back in 1973. Each of the litigants put forth their own postulated mean high water line and then their correspondence indicates agreement upon a compromise line. John Adams, Chief of the Regulatory Review Board for the Corps, testified to the Corps' acceptance of this mean high water line and this Court sees no reason not to resurrect that accepted mean high water line and use it as a guidepost for the fashioning of any necessary injunctive relief and any necessary future permitting. The difference in area between the compromise mean high water line

and the Phillips and Trice projected mean high water line is not really significant.

Defendants' Counterclaims

Defendants have prayed that the United States and the State of Florida be enjoined from requiring prospective permitting of the wetlands area above the mean high water line (Defendants assert that the appropriate mean high water line is the compromise line and this Court already outlined its agreement). In effect, Defendants request that the time be frozen as of January 24, 1973, and that they be allowed to develop the property *south* of the compromise mean high water line without the necessity of obtaining a § 404 permit. This Court believes that the argument in favor of this injunctive relief is well-founded, for if the Court were to require the Defendants to obtain a permit for land above the mean high water line the Corps' intervening regulations, promulgated in 1975, would prohibit the award of this permit. The parties appear to have conceded that at the time the fill was placed the Corps' authority extended to navigable waters *landward* of the mean high water line, but that prior to 1975 and the regulations enacted after *National Resources Defense Counsel, Inc. v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975), the Corps was *only* exercising its jurisdiction over property *below* or *bayward* of the mean high water line. This latter point is particularly true in Monroe County, Florida, and the land encompassed by Roosevelt Boulevard. Until the *National Resources* decision the Corps had maintained that the broadest possible interpretation of "the waters of the United States" ceased at the mean high

water line. *See*, 33 CFR § 209.260(k)(1)(ii), adopted September 9, 1972, and 33 CFR § 209.120 adopted April 3, 1974. The Corps explicitly stated what it thought its jurisdiction was when it stated, "regulatory jurisdiction of the Corps in Coast areas extends to the MHW line except on the Pacific Coast where it extends to the MHHW line." 33 CFR § 209.260(k)(l)(ii). The above-cited regulation was in effect throughout December of 1972 and if there is any credence to the legal precept that federal agencies are bound by their own regulations, then it is impossible to punish these Defendants for relying on the Corps. *See generally, Kirkland Masonry, Inc. v. Cir*, 614 F.2d 532, 534 (5th Cir. 1980).

The Defendants' counterclaim is greatly enhanced by the well reasoned opinion issued by District Judge Hawkins in *United States v. Martin, supra*. The Defendants have argued that activity above the mean high water line should not be hampered because the Corps had no authority in these areas throughout the period when the fill operation was in progress. Judge Hawkins acknowledged complete agreement with this contention when he stated:

> If the pond was built above the mean high water mark which existed in 1973, however, then the Corps could not have required a permit because it would not have had jurisdiction. *See, Moretti*, 331 F. Supp. at 158; *Sexton Cove*, 526 F.2d at 1297.

United States v. Martin, supra, 517 F. Supp. at 215. The foregoing statement is directly applicable to Defendants' counterclaim in that *no Corps' permit was needed to fill or develop land above the mean high water line in 1973 and none should be required now.*

For this Court to require that the Defendants now obtain a permit for development of Parcel 38 would be patently unfair. By making this decision this Court is giving the Defendants no greater rights than they had in December of 1972 and January of 1973. The government has argued that the Defendants were free in January, 1973, to continue development above the mean high water line since the cease and desist order only addressed land below the mean high water line demarcation. Unfortunately, however, the government was unable to inform the Defendants where that elusive line might be, so the government was inviting the Defendants to risk the possibility of continuing to be in violation of the law. This court does not believe that this course of action was a feasible alternative or that any reasonably prudent businessman would gamble on the loss of additional time, labor and money. After submitting a permit application to the Corps in June, 1973, the Defendants then took their case to various state and federal administrative and judicial bodies and these actions should not work an injury upon the Defendants. This case is unlike *Bankers Life* where the developer-owner's inactivity exhibited a failure to safeguard or exempt themselves from intervening regulatory changes nor is it like *Deltona Corp. v. United States*, Aug. 19, 1981, No. 370-76, U.S. Ct. Claims (Slip Opinion, p. 14), where the developers knew when they commenced the project that Corps permits would be required. Had the Corps not intervened in January, 1973, without locating the mean high water line the land above the mean high water line could have been developed, and once done, it would have been grandfathered and exempt from the corps' revised wetlands policy. 33 CFR

§ 209.120(e)(2)(iii); 40 Fed. Reg. 31326 (July 25, 1975). Given the facts of the instant case, this Court is of the opinion that requiring a § 404 permit for the property above the mean high water line would be a *retroactive* application of Corps regulations and this requirement would be unreasonable and result in a "manifest injustice." *See generally, Bradley v. School Board of Richmond,* 416 U.S. 711 (1974); *General Telephone Co. of the Southwest v. United States,* 449 F.2d 846, 863 (5th Cir. 1971).

Accordingly, this Court orders that the United States of America and the State of Florida are enjoined from requiring prospective permitting of the property on Parcel 38, south of the compromise mean high water line. The Defendants shall be free to fill and develop said property subject to compliance with all applicable City of Key West requirements and all applicable rules and regulations setting the placement, location, height, density and method or manner of fill; and, conditioned further, that the Marks Defendants and/or island in the Sun and/or their successors/assigns cause partial restoration of the area below the compromise mean high water line as ordered herein.

Individual Liability

The government has strenuously argued that the individuals associated with Island in the Sun should be held personally and severally liable for the alleged violations of federal law.[4] The government has argued that

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[4] Actually, in view of the fact that the Court has conditioned the use of the land *above* the mean high water line

Island in the Sun's corporate veil should be pierced or alternatively that the individuals incurred personal liability for directing the placement of the fill. The latter theory is completely unsupported by the prior case law in this area. In both *Moretti II* and *Sexton Cove* the Fifth Circuit held that individual developer-owners could not be held personally liable for activities performed in their roles as corporate officers. *United States v. Sexton Cove Estates, supra,* 526 F.2d at 1300-1301 (reversing the judgment against Ralph Osterle, President of Sexton Cove); *United States v. Moretti, supra,* 526 F.2d at 1310-1311 (reversing the judgment against Joseph G. Moretti, Jr., Vice-President of Joseph G. Moretti, Jr., Inc.). The Fifth Circuit has succinctly stated that, "[T]he enforcement section of the Statute, 33 U.S.C. § 406, does not provide that an officer of a corporation which violates Section 403 is personally liable on any subsequent civil judgment . . . " *United States v. Sexton Cove,* 526 F.2d at 1300.

Island in the Sun Condominiums of Key West, Florida, Inc., was and is a duly incorporated corporation of the State of Florida. The trial testimony that Island in the Sun was incorporated for the purpose of developing Parcel 38 is unrefuted. Testimony indicated that Island in the Sun was a de facto corporation during much of December of 1972, and that the Articles of Incorporation were actually authorized on December 29, 1972. Clearly, the corporation was created to limit the liability of the property's

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upon the Marks Defendants and/or Island in the Sun causing the partial restoration to be accomplished, the issue of individual liability versus corporate liability is really rendered moot.

owners, investors and developers but that fact doesn't warrant piercing the corporate veil. The Florida Supreme Court has stated:

> Those who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law which protect them against personal liability unless it be shown that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil.

Roberts' Fish Farm v. Spencer, Fla. 1963, 153 So.2d 718, 721. The case law is legion holding that a corporate entity should be disregarded only in the most extraordinary circumstances. *United States v. Dean Van Lines, Inc.*, 531 F.2d 289 (5th Cir. 1976). *Puamier v. Barge B.T. 1793,* 395 F. Supp. 1019 (D. Va. 1974). The facts of the instant case indicate that the organizers and officers of Island in the Sun were less than diligent in maintaining close adherence to the formalities of corporate operation but it is obvious that the corporation was in a formative stage and there is no indication that the corporation was intended to circumvent the Corps' regulations or the applicable environmental legislation.

In rendering its decision refusing to find individual liability the Court was favorably influenced by the parties' previous stipulated consent judgment. *United States of America v. Island in the Sun,* 73-509-Cr-WM. A fair reading of that stipulation indicates that all parties agreed that Island in the Sun bore responsibility for the placement of the fill. *Id.*, p. 2, 4. Further, such stipulation expressly found that the situation which existed in 1972

at the time of the fill and in 1973 at the time of the criminal prosecution, was directly analogous to a letter attached to the stipulation in evidence from J. W. Morris, Major General, USA, Director of Civil Works, United States Army Corps of Engineers to the Honorable John C. Whitaker, Undersecretary of the Interior, dated March 21, 1973. Such letter stated the government's position with reference to a situation described by the parties to this action in their stipulation as analogous. The government may be bound by a stipulation entered into freely by it and in this case there is no reason for the Court not to enforce the terms of the stipulation.

Numerous cases have held that the government is no different from other parties who voluntarily and freely enter into a stipulation, and as such, the government is bound by its stipulations. *See generally, Sohappy v. Smith,* 529 F.2d 570 (9th Cir. 1976); *Thrash v. O'Donnell,* 448 F.2d 886 (5th Cir. 1971); *Fenix v. Finch,* 436 F.2d 831 (8th Cir. 1971). The *Fenix* case held the Secretary of Health, Education and Welfare to his stipulation regarding Social Security benefits noting that stipulations are generally controlling and conclusive. There exists "considerable authority in support of the proposition that a consent judgment, including a judgment on an agreement should not be deprived of collateral estoppel effect by the fact that it was rendered upon the consent of the parties rather than as the result of an adversary trial." 1B *Moore's Federal Practice,* ¶ 0.444[3] at 4009 (2d ed. 1980). The instant case involved a stipulated judgment encompassing the issue of liability and the current view is that collateral estoppel attaches to such stipulations if that intention is evidenced by the stipulation. *Id,* at 4025;

Anderson, Clayton & Co. v. United States, 562 F.2d 972, 992 (5th Cir. 1977). After reviewing the document and its attachments, this Court concludes that the stipulation encompassed the issue of liability and the government should be bound by said stipulation. For the foregoing reasons, it is hereby

ORDERED, ADJUDGED and DECREED that:

1. Plaintiff's request for restoration is partially granted in the Defendants shall be required to restore tidal fluctuations to the impounded area and promote the free flow of aquatic organisms by means of constructing sufficient breaks in the north, east and west berms or by some comparable plan intended to achieve the same ecological and environmental objectives.

2. Plaintiff and plaintiff-intervenor are required to abide by the regulations in effect during December of 1972 and January of 1973, and thus the Defendants are free to fill and develop the property south of the compromise mean high water line previously agreed to by the parties; provided, however, that the use and development aforesaid shall be, and is specifically conditioned upon, the Marks Defendants and/or Island in the Sun Condominiums of Key West, Florida, Inc. and/or their successors/assigns, causing the partial restoration set forth in paragraph 1 hereof to be accomplished at their expense.

3. Whether attorneys' fees and costs should be awarded is reserved until the parties seeking same submit formal requests with supporting memoranda, setting forth the legal basis claimed for such award, the amount sought with supporting affidavits, within fifteen (15)

days herefrom, and opposing parties shall respond thereto within fifteen (15) days thereafter.

DONE AND ORDERED in Chambers at Miami, Southern District of Florida, this 15 day of January, 1982.

/s/ Sidney M. Aronovitz
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

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UNITED STATES of America,
Plaintiff-Appellant,

and

State of Florida, Department of Environmental Regulation,
Plaintiff-Intervenor,

v.

CONTEXT-MARKS CORPORATION, et al.,
Defendants-Appellees.

No. 82-5444.

United States Court of Appeals,
Eleventh Circuit.

March 29, 1984.

The United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., refused to grant a permanent injunction to the Government requiring removal of fill allegedly placed below the mean high water line in violation of the Rivers and Harbors Act and Federal Water Pollution Control Act. Defendants had counterclaimed against the United States and the plaintiff intervenor, the State of Florida Department of Environmental Regulation. The Government appealed. The Court of Appeals, Allgood, District Judge, sitting by designation, held that in fashioning order for restoration of wetlands, court should base order on complete examination of both environmental factors involved and practicalities of the situation, and, in case at bar, there was no abuse of discretion in the trial court's ordering partial restoration, consistently with equitable standards for fashioning relief for Government in cases of violation of federal dredge and fill regulations.

Affirmed.

Anne S. Almy, Appellate Section, Land and Natural Resources Div., U.S. Dept. of Justice, Robert L. Klarquist, Environmental Defense Section, Washington, D.C., for plaintiff-appellant.

Paul R. Ezatoff, Jr., State of Fla., Dept. of Environmental Regulation, Tallahassee, Fla., Maria A. Iizuka, Dept. of Justice, Land and Natural Resources Div., Washington, D.C., for State of Fla.

Robert L. Parks, Podhurst, Orseck & Parks, P.A., Joel D. Eaton, Miami, Fla., for Island, L.M. Marks and J. Pijuan.

Joseph C. Jacobs, Ervin, Varn, Jacobs, Odom & Kitchen, Melissa Allaman, Tallahassee, Fla., for Toppino & Sons.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

ALLGOOD, District Judge:

The government appeals from the district court's refusal to grant a permanent injunction against appellees, Marks Development, Inc., et al. The government had sought to require the appellees to remove approximately 20,000 cubic yards of fill material which the government contended had been placed below the mean high water

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

line (hereinafter MHWL)[1] in violation of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311(a) (the Clean Water Act).

The appellees counterclaimed against the United States and the plaintiff-intervenor, the State of Florida Department of Environmental Regulation, seeking injunctive relief from prospective permitting of the subject property above the MHWL and proposing an alternative restoration plan in the event that the court found some restoration necessary.

The property in question, Parcel 38, is a roughly rectangular piece of land, enclosed by Roosevelt Boulevard and comprising 52 acres in Key West, Florida. This property was purchased in June, 1972, and was to be developed in a multi-unit apartment complex and marina in accordance with the Master Plan of the City of Key West. In November of 1972, the appellees applied for and obtained a dredge and fill permit from the City of Key West. A fill operation on approximately 10 percent of Parcel 38 was commenced in November and December of 1972.

During the time that this fill operation was taking place, the *Randall Act, F.S.* 253.135(3), which exempted property in Key West from state dredge and fill permit requirements, was in full force and effect. Also at this time, the Corps of Engineers was not exerting jurisdiction above the MHWL and did not require permits to fill

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[1] Also called mean high water mark and mean high tide line.

above the MHWL. Historically, the Corps had not exercised its full jurisdiction in the area of the fill in question (within Roosevelt Boulevard) and had not required permits to fill *below* the MHWL in that area.

In January, 1973, the Corps sent a cease and desist order to the appellees concerning the fill which the Corps alleged was below the MHWL. In June, 1973, the government filed a criminal information against Island in the Sun Condominiums, Inc.,[2] charging unauthorized filling. The Corporation pleaded *nolo contendere* and was fined $500.

An application to dredge a marina in the area bounded by the fill was submitted in July, 1973. This application was considered by all the parties concerned to be an after-the-fact permit application. Appellees were denied the permit because they had been denied a water quality certification (a prerequisite for the granting of a permit) by the State of Florida. Appellees were ordered to remove the fill at this time and were so ordered again in November, 1977, after the Florida Supreme Court denied certiorari to review the state court's decision to uphold the denial of certification. When the appellees failed to comply, this suit was brought.

On January 15, 1982, the district court ordered partial restoration, additionally, the appellants were ordered to abide by the regulations in effect in December 1972 and January 1973 provided that the appellees accomplished the partial restoration at their own expense. The district

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[2] Island in the Sun Condominiums, Inc., was formed to develop the property.

court also held that the appellees were not individually liable.

The government raises three issues on appeal:

1. Whether, under the facts of this case, the United States may be estopped from requiring the appellees to comply with the provisions of the Clean Water Act prior to filling wetlands situated above the MHWL.

2. Whether the appellees should be required to remove illegally placed fill material and restore the wetlands to their original condition.

3. Whether the district court improperly failed to hold the individual appellees liable for the costs of remedying a violation of the River and Harbor Act.

With respect to the first issue raised by the government, the district court held that "requiring a § 404 permit for the property above the mean high water line would be a *retroactive* application of Corps regulations and this requirement would be unreasonable and result in a 'manifest unjustice.' " (citations omitted) (emphasis in original). The court found that had the Corps not intervened in January 1973 without determining the location of the MHWL, the land above the MHWL could have been developed prior to the implementation of the Corps revised wetlands policy (33 C.F.R. § 209.120(e)(2)(iii)) which required permits for work above the MHWL, and thus would have been "grandfathered" in.

In a factually similar case decided by this same panel, *Buccaneer Point Estates, Inc., et al. v. United States, et al.*, 729 F.2d 1297 (11th Cir.1984, we held that retroactive application of the permitting requirement would not be

appropriate. We affirm the similar holding of the lower court here.

The trial court's determination to order partial restoration of the filled portion of Parcel 38 rather than the total restoration sought by the government rests upon two separate grounds: (1) equitable estoppel; and (2) equitable standards for fashioning relief for the government in cases of violation of federal dredge and fill regulations.[3] The government argues that the trial court erred in estopping the government from obtaining total restoration below the MHWL and that it abused its discretion in ordering only partial restoration. As this court finds the action of the trial court to be fully sustainable on the second ground alone, we decline to address the estoppel issue.[4]

The cases utilized by the district court in fashioning its restoration order indicate that the court should base

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[3] The trial court, in its memorandum opinion, referred to a trilogy of cases as setting forth the "standard for fashioning restoration" in this circuit: *United States v. Sexton Cove Estates*, 526 F.2d 1293 (5th Cir.1976); *Weiszmann v. District Engineer, U.S. Corps of Engineers*, 526 F.2d 1302 (5th Cir.1976); *United States v. Moretti*, 526 F.2d 1306 (5th Cir.1976) (Moretti II).

[4] This court has held that equitable estoppel will not lie against the government when it acts in its sovereign capacity. *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir.1982); *Hicks v. Harris*, 606 F.2d 65 (5th Cir.1979). The district court found that the Corps' activities amounted to "affirmative misconduct" and applied estoppel, however the "affirmative misconduct" exception to the general rule that the United States is not subject to an estoppel when it acts in its sovereign capacity has not been accepted by this circuit. *See, Deltona, supra.*

such orders on "a complete examination of both the environmental factors involved and the practicalities of the situation." *Weiszmann v. District Engineer, U.S. Corps of Engineers*, 526 F.2d 1302, 1304 (5th Cir.1976); *United States v. Moretti*, 526 F.2d 1306, 1310 (5th Cir.1976); see, also, *United States v. Sexton Cove Estates*, 526 F.2d 1293 (5th Cir.1976). The memorandum opinion of the district court reveals a careful consideration of all relevant factors. We find the government's allegations of error with regard to the findings of fact on this issue without merit and find no abuse of discretion in the court's order for partial restoration.

As a condition for further development, the district court below ordered the individual defendants as well as the corporate developer to restore the property below the MHWL. Therefore, this court need not reach the third issue raised by the government.

Accordingly, for the reasons discussed above, the decision of the district court is AFFIRMED.

UNITED STATES CLAIMS COURT

CASE NO.: 506-89 L

LAWRENCE MARKS, et al.,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

_____/

AFFIDAVIT OF LAWRENCE MARKS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF FLORIDA)
ss
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared, LAWRENCE MARKS, who after being duly sworn, deposes and states:

1. My name is Lawrence Marks, I am over 18 years of age, and I have personal knowledge of the facts set forth in this affidavit.

2. I have worked in the construction industry in South Florida for over 30 years.

3. I, along with the other plaintiffs to this action, acquired the property that is the subject of the above-

styled litigation, located in Key West, Florida (the "Property"), for the purpose of developing it as a multi-unit apartment complex and marina.

4. The plaintiffs to this action held an ownership interest in parcels 34 and 38 of the Property from 1972 until 1986. This interest was previously held through two corporations, Context-Marks and, later, Marks Development, Inc., for development purposes. In addition, three other individuals, Joaquin Pijuan, Tom Carlos and Osnardo Drago held small interests in the Property for a short period of time. All persons who previously held an interest in the Property have transferred any and all causes of action they may have against Defendant, with respect to the Property, to Plaintiffs.

5. At the time that Plaintiffs acquired parcel 38, they also entered into a contract to purchase parcel 34 and thereby acquired the right to use Parcel 34, which provides the only means of ingress and egress to parcel 38.

6. At all relevant times, I was the person in charge of the development project on the Property. My duties were to include coordinating the requisition of any necessary permits, obtaining financing, supervision of draft plans, and overseeing the actual construction.

7. The Property, which was wetlands, could not be built upon, developed or used for any economically viable purpose unless it was filled. Accordingly, I obtained a city permit, which I thought was the only necessary permit for dredge and fill purposes and directed that fill activity on parcels 34 and 38 to commence in late 1972.

8. Shortly after fill operations on parcels 34 and 38 began, I received a cease and desist order from the U.S. Army Corps of Engineers (the "Corps') directing that all filling below the means high water line be stopped.

9. The cease and desist order did not specify the location of the mean high water line, nor was the order limited to parcel 38. Accordingly, upon receipt of the cease and desist order, all fill activities on parcels 34 and 38 were terminated in order to ensure compliance with the Corps directive.

10. The Corps subsequently filed criminal charges against persons connected with the fill and dredge activity on the Property. I, on behalf of the persons charged, entered into a stipulation to plead nolo contendere to charges of illegal fill and dredge activity. The agreement was based upon the Corps' acknowledgement that it had never before exercised jurisdiction on property of this nature, that all fill and dredge activity had been conducted in good faith, and on the assurance that an after the fact dredge and fill permit would be issued for the Property.

11. The Corps subsequently advised me that before it would issue a permit to dredge and fill the Property, I would have to first obtain a Florida Water Quality Certificate. Based upon the Corps' instructions, I applied for a Florida Water Quality Certificate. In addition, I had numerous changes made to the development plans in an effort to comply with various other Corps directives.

12. In spite of the great effort to appease the Corps, as a result of the Corps' regulation over the property, the

owners were unable to fill and dredge, develop or otherwise make any economically viable use of any portion of the Property from the time that the Corps ordered that all fill and dredge activity be stopped on or about February 19, 1973, until at least March 1, 1984.

FURTHER AFFIANT SAYETH NOT.

/s/ Lawrence Marks
LAWRENCE MARKS

SWORN TO AND SUBSCRIBED to before me, this 7th day of January, 1991.

/s/ Debra A. Illegible
NOTARY PUBLIC, State of Florida

Notary Public, State of Florida
My Commission Expires
March 23, 1991
Illegible

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(2)

Supreme Court, U.S.
FILED
DEC 15 1997
CLERK

No. 97-652

In the Supreme Court of the United States

OCTOBER TERM, 1997

LAWRENCE MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether petitioners have a compensable interest under the Fifth Amendment's Taking Clause in property that lies below the mean high water level (MHWL) and falls within the navigational servitude of the United States.

2. Whether the government's actions to stop petitioners' fill activities of property situated below the MHWL resulted in a taking of their property above the MHWL.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-652

LAWRENCE MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Federal Claims (Pet. App. 1a-53a) is reported at 34 Fed. Cl. 387. The court of appeals' judgment of affirmance (Pet. App. 54a-55a) is unpublished, but the decision is noted at 116 F.3d 1496 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1997. A petition for rehearing was denied on July 16, 1997. Pet. App. 56a-58a. The petition for a writ of certiorari was filed on October 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns two parcels of land in Key West, Florida, which petitioners acquired in 1972 and 1980 with the intention of developing them for condominiums.[1] The property contains a low-lying salt marsh area that is subject to tidal fluctuations; some of the property lies above the mean high water level (MHWL) and some below the MHWL. Pet. App. 2a-3a, 61a-62a. Petitioners' attempts to develop the property by filling and dredging the areas below the MHWL have resulted in a long-running series of different lawsuits, of which this is the most recent.

1. In 1972, petitioners began to fill areas of the property below the MHWL and planned to dredge other areas to create a marina. Pet. App. 4a. In January 1973, the Army Corps of Engineers (Corps) ordered petitioners to cease and desist their fill operations below the MHWL, informing petitioners that a federal permit was required under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403. Pet. App. 5a-6a. The Corps further ordered petitioners to remove all fill placed below the MHWL. *Id.* at 6a. Although petitioners and the Corps initially disagreed over where the MHWL fell, the two sides eventually agreed upon a compromise MHWL. *Id.* at 7a.[2]

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[1] The parcels are denominated Parcel 38 and Parcel 34. Parcel 38 is a 52-acre parcel that abuts the Riviera Canal, a man-made channel that connects to the Atlantic Ocean. Parcel 34 is a small strip of land that connects Parcel 38 to Roosevelt Boulevard, a major thoroughfare in Key West. Pet. App. 2a-3a.

[2] In addition to the cease and desist order, the United States brought a criminal information against petitioner Island in the Sun Condominiums, Inc., charging it with the unauthorized filling of one of the parcels of land. Petitioner Island in the

Rather than remove the fill as ordered by the Corps, petitioners attempted to obtain an after-the-fact permit to allow the fill below the MHWL to stay in place and to permit dredging. Pet. App. 7a. In order to receive such a permit from the Corps, petitioners were required to obtain a state water quality certification pursuant to the Clean Water Act, 33 U.S.C. 1341. On April 2, 1974, however, the State of Florida denied the necessary certification. Pet. App. 7a. As a result, the Corps denied petitioners' permit application and again directed petitioners to remove all fill placed below the MHWL. *Id.* at 7a-8a. Florida's administrative denial of the water quality certification was affirmed in the state courts. *Island-in-the-Sun Condominium of Key West, Florida, Inc.* v. *Governor & Cabinet of Florida*, 345 So. 2d 831 (Dist. Ct. App.), cert. denied, 352 So. 2d 172 (Fla. 1977).

After petitioners refused to comply with additional orders by the Corps to remove the fill below the compromise MHWL, the Corps brought an enforcement action in the United States District Court for the Southern District of Florida in October 1980, seeking a permanent injunction requiring petitioners to remove the fill they had placed below the MHWL in 1973. Pet. App. 8a. Petitioners counterclaimed, requesting compensation for an alleged taking. *Id.* at 9a. The district court rejected the takings counterclaim on jurisdictional grounds and, on January 15, 1982, ruled that petitioners could continue to develop the property above the compromise MHWL if they removed enough of the fill below the MHWL to allow tidal fluctuations and the free flow of aquatic

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Sun pleaded nolo contendere and paid a $500 fine. Pet. App. 7a.

organisms. *Id.* at 9a-10a; see *id.* at 59a-94a (district court opinion). That decision was affirmed by the Eleventh Circuit. *United States* v. *Context-Marks Corp.*, 729 F.2d 1294 (1984) (Pet. App. 95a-101a).

Petitioners thereafter acquired Parcel 34, the property adjacent to Parcel 38. In 1986, they commenced filling activity on Parcel 34. The Corps responded to that activity by issuing another cease and desist order. Pet. App. 10a-11a. Petitioners then sought an order from the district court to enforce the portion of the January 15, 1982 order that allowed them to continue to develop the property. *Id.* at 11a. The district court ruled that it lacked jurisdiction because the 1982 case involved a different part of the property. *Ibid.*

On November 4, 1988, petitioners filed an action in the United States District Court for the Southern District of Florida, in which they sought declaratory and injunctive relief regarding the legality of the government's regulation of their development activities. Pet. App. 11a. All of petitioners' claims, including a takings claim, were dismissed by petitioners voluntarily or by order of the district court. *Id.* at 12a & n.6.

2. On September 18, 1989, petitioners filed the present action in the United States Court of Federal Claims, claiming that the Corps' actions with regard to petitioners' fill activities constituted a temporary regulatory taking. Pet. App. 12a-13a. On November 6, 1995, the court granted the United States' motion for summary judgment. *Id.* at 1a-53a.

The court held that petitioners could not assert a takings claim for property below the MHWL because such property lies within the navigational servitude of the United States, over which the authority of

the government is supreme. Pet. App. 31a-33a (citing *United States* v. *Rands*, 389 U.S. 121, 123 (1967)). Applying this Court's decisions (see *id.* at 42a-43a), the court also rejected petitioners' claim of a temporary regulatory taking of their property above the MHWL. The court first examined the "validity of the government actions" and found "sufficient evidence in the instant case to demonstrate that there was a legitimate state interest in preserving the quality of water within the area of [petitioners'] land." *Id.* at 50a. Second, the court found that petitioners had failed to show that the governmental action had left the land "devoid of all economic viability." *Id.* at 51a. Although petitioners did not develop the land during their disagreement with the Corps, petitioner Lawrence Marks admitted that such development did not proceed due to a lack of money and the economic recession in the area. *Ibid.* The trial court further noted that the economic viability of the property was demonstrated by the fact that, during the alleged temporary taking, petitioners profited from the sale of parts of the land for "millions of dollars." *Ibid.* Third, the court found that the Corps' actions did not interfere with petitioners' reasonable investment-backed expectations. *Id.* at 51a-52a. As to that factor, the court rejected petitioners' argument that they purchased the property in reliance on the government's purported lack of enforcement of its regulations. In the court's view, the existence of the Rivers and Harbors Appropriation Act should have alerted plaintiffs to the possibility of enforcement. *Id.* at 52a.

On May 15, 1997, the Court of Appeals for the Federal Circuit issued a per curiam order affirming the judgment of the Court of Federal Claims. Pet. App. 54a-55a.

ARGUMENT

Petitioners claim that the government's regulation of their fill activities resulted in a temporary regulatory taking of their property both below and above the mean high water level (MHWL). Neither claim finds support in this Court's precedents, and the decision below does not conflict with any decision of any other court. Further review, therefore, is not warranted.

1. It has long been established that property below the navigable waters of the United States is subject to the "dominant servitude" of the federal government to regulate such property in the interest of navigation: "The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States* v. *Rands*, 389 U.S. 121, 123 (1967). See also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028-1029 (1992) ("a permanent easement that was a pre-existing limitation upon the landowner's title," such as the United States' navigational servitude, inheres in a landowner's title); *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 705-706 (1987) (rejecting claim that United States owed just compensation for dredging damage to land beneath navigable waters owned in fee simple by tribe); Pet. App. 31a-32a (collecting cases). Thus, under this Court's cases, the Fifth Amendment's Just Compensation Clause does not require the payment of compensation to the owner of land that lies below the MHWL when regulatory action is taken pursuant to

the United States' exercise of its right to control the navigable waters.

Petitioners acknowledge (Pet. 13) the "absolute language in many of [this Court's] prior decisions," but nonetheless contend that the lower courts' rulings in this case conflict with this Court's decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). That assertion is incorrect. *Kaiser* held that the navigational servitude did not insulate the government from a takings claim when a private landowner had linked private, non-navigable waters with the navigable waters of the United States, and the government later maintained that the public had a right to freely use the formerly private area. *Kaiser*, however, is inapposite to petitioners' case. In contrast to the property at issue in *Kaiser*, petitioners' property below the MHWL has always been part of the navigable waters and thus subject to the federal government's dominant servitude. Moreover, in *Kaiser*, the government sought to infringe on the property owners' right to exclude others, whereas here the Corps merely regulates petitioners' development activities. *Id.* at 179-180. *Kaiser* held that such regulation does not require just compensation. See *id.* at 179 ("We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, * * * [but] we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.") (footnote omitted).

Petitioners read *Kaiser* (Pet. 13) as standing for the proposition that the government must pay compensation when it regulates the navigable waters for

a non-navigation purpose, such as the preservation of environmental resources. *Kaiser*, however, expressly rejects that argument. See 444 U.S. at 173 ("[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. In truth the authority of the United States is the regulation of commerce on its waters.") (quoting *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (ellipsis omitted)). Moreover, even if that argument had not been expressly rejected by *Kaiser*, it would have no bearing on this case, because the Corps has consistently justified stopping petitioners' fill activities due to the potential for interference with navigation. See Pet. App. 6a (invoking the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, not the Clean Water Act, as the basis for Corps' cease and desist orders).

2. Petitioners contend (Pet. 15-24) that the courts below erred in rejecting their claim that the actions by the Corps in opposition to petitioners' fill activities resulted in a temporary regulatory taking of their property above the MHWL. That fact-bound ruling properly applied this Court's standards governing claims of temporary regulatory takings.

This Court has stated that, in determining whether government regulation results in a Fifth Amendment taking, courts engage "in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495 (1987) (quoting *Kaiser*, 444 U.S. at 175). See also *Penn*

Central Transportation Co. v. *New York City*, 438 U.S. 104, 124 (1978). In this case, the trial court examined precisely the three factors identified by this Court in *Keystone Bituminous Coal* and *Penn Central*. See Pet. App. 42a-53a. Petitioners do not dispute that those factors establish the appropriate legal test, but rather disagree with how the court applied those factors to the facts of this case. That fact-bound application of settled law does not warrant this Court's review.

In any event, the trial court properly applied the factors identified by this Court. First, in analyzing the character of the governmental action, the court found that, while the government's regulation of petitioners' activities below the MHWL was a hindrance to the development of the property above the MHWL, it did not go so far as to amount to a taking of that property. Pet. App. 45a-48a. Second, the court found that the governmental action did not leave the property devoid of all economically viable uses because (a) the Corps' cease and desist orders did not preclude petitioners from developing the property above the MHWL; (b) petitioners admitted that they did not develop the property due to the economic recession and a lack of funding; and (c) petitioners sold a portion of the property above the MHWL at a profit. *Id.* at 51a. Third, the court found that the government's actions did not interfere with petitioners' reasonable investment-backed expectations because the existence of regulatory authority under the Rivers and Harbors Appropriation Act was known to petitioners when they purchased the property. Petitioners thus could not show that they had bought the property in reliance on a reasonable expectation

that the government would never exercise its regulatory authority. *Id.* at 51a-52a.

Petitioners primarily challenge (Pet. 15-21) the trial court's reliance on the profit they made in selling the property, but fail to acknowledge that that profit was only one of several facts that led the court to conclude that the government had not entirely deprived the property of all economically viable uses. Thus, even if reliance on that fact was in error, it would not entitle petitioners to any relief, as the remaining facts fully justify the court's decision. In any event, the court's reliance on the profit petitioners made by selling a portion of the property was indeed relevant in showing that the property had economically viable uses, as the sale occurred during the period when petitioners allege that the government's regulation caused a temporary taking. See Gov't C.A. Br. 30-31.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-652

In The

Supreme Court of the United States

October Term, 1997

LAWRENCE MARKS; SUN BANK/MIAMI, N.A. and EDWARD A. MOSS, as personal representatives of the estate of Eugene Marks; MORRIS S. MARLIN, as personal representative of the estate of Paul Marks; HERMAN MARKS; IRENE O. MARKS, individually and as personal representative of the estate of Stanley Marks; MARKS DEVELOPMENT, INC.; and ISLAND IN THE SUN CONDOMINIUMS OF KEY WEST FLORIDA, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. With respect to the first question presented, the plaintiffs and the government obviously differ in their reading of this Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). We will leave a reading of the decision to the Court, confident that we have accurately parsed it and that the government has not. We also remind the Court that, with the singular exception of the instant case, the Court of Appeals for the Federal Circuit has read *Kaiser Aetna* exactly as we have read it, so the government's attempt to distinguish it here is plainly suspect. We stand by our demonstration of conflict.

The government apparently lacks confidence in its reading of *Kaiser Aetna* because it attempts to finesse the first question presented here with an alternative argument. It argues that the conflict is irrelevant in any event because the Corps halted the plaintiffs' development "in aid of navigation" rather than "in aid of environmental protection":

> . . . the Corps has consistently justified stopping petitioners' fill activities due to the potential for interference with navigation. See Pet. App. 6a (invoking the Rivers & Harbors Appropriation Act of 1899, 33 U.S.C. 403, not the Clean Water Act, as the basis for Corps' cease and desist orders).

(Brief in Opposition, p. 8). We cannot allow this demonstrably false statement to go unchallenged.

It is true that the 1973 cease and desist telegram addressed "fill in the navigable waters of the United

States adjacent to the Riviera Canal" (Pet. App. 5a). However, the reference to "navigable waters" was simply a reference to the property below the MHWL, which is the line by which "navigable waters" is defined; it was not an assertion of the Corps' jurisdiction "in aid of navigation." The plaintiffs did not place any fill in the Riviera Canal; the fill was placed on "wetlands," and boats simply cannot "navigate" on "wetlands." Just as importantly, even a cursory skimming of Judge Aronovitz's 1982 decision will reveal that the Corps asserted its jurisdiction over the plaintiffs' wetlands for environmental and ecological reasons, and for no other purpose – and most certainly *not* "in aid of navigation" or in furtherance of any other form of interstate commerce which the government's "navigational servitude" is designed to protect.

And while it is also true that the Corps asserted its jurisdiction under the Rivers and Harbors Act rather than the Clean Water Act, it is no secret that the Rivers and Harbors Act was being utilized by the Corps at the time to extend its tentacles well beyond matters of navigation, as a tool to promote environmental and ecological concerns.* In addition, of course, the Corps relied upon the Rivers and Harbors Act to promote its ecological concerns for the plaintiffs' wetlands, rather than the Clean Water Act, because the "Clean Water Act of 1977" (§ 1, Pub. L. 95-217) was not even in existence when the cease

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* *See, e. g., United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Zabel v. Tabb*, 430 F.2d 199, 25 A.L.R. Fed. 684 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). *See generally* Annotation, *Authority of Secretary of Army to Deny Dredging and Filling Permit for Ecological Reasons Under § 10 of Rivers and Harbors Act of 1899*, 33 U.S.C.S. § 403, 25 A.L.R. Fed. 706 (1975).

and desist telegram was sent four years before its enactment, in 1973. We stand by our initial argument.

2. With respect to the second question presented, and notwithstanding that the government placed nearly all of its eggs in this basket below, the government has now tacitly conceded our point – that the lower courts erred in concluding that the temporary taking of the plaintiffs' property above the MHWL was not compensable because the property increased in value during the period of taking and was sold for a profit after the taking ceased. The government argues only that the profit was "relevant in showing that the property had economically viable uses, as the sale occurred during the period when petitioners alleged that the government's regulation caused a temporary taking" (Brief in Opposition, p. 10). We must respectfully disagree with this additional attempt to finesse the now conceded error of the courts below.

The plaintiffs' property above the MHWL was rendered undevelopable by the Corps' actions in 1973. Its use as developable property was not restored to the plaintiffs until the federal courts ordered the government to permit its development as planned, in 1984. The sales which the government claims are "relevant" occurred in 1986 and 1989 – *after* the Eleventh Circuit affirmed Judge Aronovitz's decision restoring an economically viable use of the property above the MHWL to the plaintiffs. The sales may therefore have some bearing on the date the temporary taking ceased, but they most certainly do not demonstrate that the property had an economically viable use from 1972 to 1984, as the lower courts plainly erred in concluding below.

3. The bulk of the government's argument is devoted to distracting the Court from the principal questions presented. To that end, the government argues that its favorable summary judgment was essentially a "fact-bound application of settled law [that] does not warrant this Court's review," and it attempts to justify the ruling with several miscellaneous "facts" which purportedly support the judgment despite the errors inherent in it (Brief in Opposition, p. 9). Given the complexity of the facts, the government can perhaps be excused for its misunderstanding of them, but because this Court's determination of whether to grant or deny certiorari should not rest upon a false factual foundation, we are constrained to set the record straight briefly in conclusion.

First, the government argues that the Corps' 1973 cease and desist order did not preclude the plaintiffs from developing the property above the MHWL. This assertion flies squarely in the face of Judge Aronovitz's finding of fact in the underlying litigation that, because the government had no idea of the location of the MHWL at the time, "the developers of the project were unable to proceed with the project for fear that additional impermissible filling would take place" (Pet. App. 69a). The assertion also flies squarely in the face of the conclusion of law bottomed upon this finding in the underlying litigation:

> . . . The government has argued that the Defendants were free in January, 1973, to continue development above the mean high water line since the cease and desist order only addressed

> land below the mean high water line demarcation. Unfortunately, however, the government was unable to inform the Defendants where that elusive line might be, so the government was inviting the Defendants to risk the possibility of continuing to be in violation of the law. This court does not believe that this course of action was a feasible alternative or that any reasonably prudent businessman would gamble on the loss of additional time, labor and money. . . .

(Pet. App. 88a).

Most respectfully, the plaintiffs were plainly deprived of their use of the property above the MHWL by the Corps' 1973 cease and desist order. Under settled principles of the doctrine of "collateral estoppel," the government is plainly bound by that fact in this litigation. And it is *that* fact to which the "settled law" should have been applied below in ruling on the government's motion for summary judgment – not the factual position squarely *rejected* by the federal courts in the underlying litigation.

Second, the government argues that its favorable summary judgment is supported by the plaintiffs' concession that they did not develop the property due to a lack of funds. Actually, what the trial court concluded was that the property had an economically viable use during the period of the temporary taking because Lawrence Marks had admitted (in a discovery deposition taken in the underlying litigation) that, in addition to the Corps' actions, the property was not filled above the MHWL after 1973, and before the date of the new wetlands regulations, because he did not have the money, and there was no money to proceed because of a recession

from 1973 to 1976 (Pet. App. 51a). Frankly, we fail to see any connection between this observation and the conclusion that the property had an economically viable use during the period of temporary taking, but we will address it nevertheless.

The fact of the matter (as the trial court's factual recitation reveals) is that the plaintiffs had entered into a joint venture agreement with Context Industries in 1972, and the money to proceed was thereby secured. And, as Mr. Marks noted on the same page of the discovery deposition upon which the trial court relied, "when we first started to fill, we were going to build right away" (Ct. App. App. 98-100). The Corps then intervened and stopped development of the property; and because of the Corps' intervention, the plaintiffs' financial backer, Context Industries, successfully sued for rescission of the joint venture agreement (*id.* 93-94). It was principally for *that* reason, and only incidentally because replacement financial backing was not readily obtainable because of the ensuing recession (not to mention the cease and desist order), that the plaintiffs did not have the money to proceed.

In any event, this issue was actually litigated between the parties in the underlying action, and Judge Aronovitz squarely rejected the government's contention in this regard – finding as a fact instead that "[h]ad the Corps not intervened in January, 1973, without locating the mean high water line[,] the land above the mean high water line *could have been developed*, and once done, *it would have been grandfathered and exempt* from the Corps' revised wetlands policy" (Pet. App. 88a; emphasis supplied). Most respectfully, this finding of fact, made after a

full-blown trial, renders any suggestion to the contrary contained in a mere discovery deposition moot; and because of the settled doctrine of "collateral estoppel," the trial court was not free to find to the contrary in this case – especially on a motion for summary judgment.

In addition, whether the plaintiffs had the money to proceed with their proposed development after 1973 is plainly irrelevant to the question of whether a compensable temporary taking occurred. It is irrelevant because, as Judge Aronovitz also found as a fact, the plaintiffs could not have proceeded to develop the property in the face of the Corps' demands even if the money to do so had been available. The availability of financial backing after Context Industries withdrew because of the Corps' actions may have some relevance to the question of the amount of the plaintiffs' damages, but it has no relevance at all to the question of whether a compensable temporary taking occurred – and the unavailability of additional financial backing for a mere three years most certainly provides no relevant support for a conclusion that the property had an economically viable use during the more than a decade in which it remained a breeding ground for mosquitoes and was rendered entirely useless to the plaintiffs by the Corps' actions.

The government's remaining efforts to finesse the important questions presented here are adequately addressed in our petition, so we will not repeat ourselves in reply. We simply submit once again that, although the underlying facts are complex enough to confuse even the most astute of courts (which, we believe, is most likely what happened below), it should ultimately be as plain as the nose on the government's face that the plaintiffs *did*

suffer a compensable temporary taking of their 52-acre tract for more than a decade, until its use as developable property was finally restored to them by the federal courts. The Fifth Amendment requires that they be compensated for that taking, and we respectfully urge the Court to restore that important constitutional right to the plaintiffs, and to similarly situated future litigants, by its proper enforcement in this case.

Respectfully submitted,

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